DOCKET

No. 08-479
Title: Safford Unified School District #1, et al., Petitioners
v.
April Redding
Docketed: October 14, 2008
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (05-15759)
Decision Date: July 11, 2008
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 9 2008	Petition for a writ of certiorari filed. (Response due November 13, 2008)
Nov 3 2008	Order extending time to file response to petition to and including December 15, 2008.
Nov 13 2008	Brief amici curiae of National School Boards Association, et al. filed.
Dec 11 2008	Brief of respondent April Redding in opposition filed.
Dec 23 2008	DISTRIBUTED for Conference of January 16, 2009.
Dec 24 2008	Reply of petitioners Safford Unified School District #1, et al. filed. (Distributed)
Jan 16 2009	Petition GRANTED The brief of petitioners is to be filed on or before Wednesday, February 25, 2009. The brief of respondent is to be filed on or before Wednesday, March 25, 2009. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 23 2009	SET FOR ARGUMENT Tueasday, April 21, 2009.
Feb 25 2009	Joint appendix filed.
Feb 25 2009	Brief of petitioners Safford Unified School District #1, et al. filed.
Mar 4 2009	Brief amicus curiae of United States filed.
Mar 4 2009	Brief amici curiae of National School Boards Association, et al. filed.
Mar 10 2009	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Mar 10 2009	Record received from the U.S.D.C. for the District of Arizona from Judge Wardlaw. (1 box)
Mar 13 2009	DISTRIBUTED.
Mar 25 2009	Brief of respondent April Redding filed. (Distributed)
Mar 30 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 1 2009	Brief amici curiae of National Association of Social Workers, et al. filed. (Distributed)
Apr 1 2009	Brief amici curiae of Rutherford Institute, et al. filed. (Distributed)
Apr 1 2009	Brief amici curiae of Juvenile Law Center, et al. filed. (Distributed)
Apr 1 2009	Brief amici curiae of Urban Justice Center, et al. filed. (Distributed)
Apr 3 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 14 2009	Reply of petitioners Safford Unified School District #1, et al. filed. (Distributed)
Apr 21 2009	Argued. For petitioners: Matthew W. Wright, Phoenix, Ariz. For United States as amicus curiae: David O'Neil, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Adam B. Wolf, Santa Cruz, Cal.

~~Name~~~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~~Address~~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioners:		
Matthew W. Wright Counsel of Record	Holm Wright Hyde & Hays PLC 10429 South 51st Street, #285 Phoenix, AZ 85044 mwright@holmwright.com	(480) 961-0236
Party name: Safford Unified School District #1, et al.		
Attorneys for Respondent:		
Adam B. Wolf Counsel of Record	American Civil Liberties Union Foundation 1101 Pacific Avenue, Suite 333 Santa Cruz, CA 95060	(831) 471-9000
Party name: April Redding		
Other:		
Raymond H. Brescia	Albany Law School 80 New Scotland Avenue Albany, NY 12208 rbres@albanylaw.com	(518)-445-3247
Party name: Urban Justice Center, et al.		
Julia M. Carpenter	Jenner & Block LLP 601 Thirteenth Street, NW Washington, DC 20005	(202) 639-6000
Party name: National Association of Social Workers, et al.		
David R. Day	Church Church Hittle & Antrim 12514 Reynolds Drive Fishers, IN 46038	(317) 773-2190
Party name: National School Boards Association, et al.		
Elena Kagan	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001	(202) 514-2217
Party name: United States		
Marsha L. Levick	Juvenile Law Center 1315 Walnut Street Suite 400 Philadelphia, PA 19107	(215) 625-0551
Party name: Juvenile Law Center, et al.		

David A. O'Neil | United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
david.oneil@usdoj.gov | (202)-514-4037

Party name: Safford Unified School District #1, et al. v. April Redding

John W. Whitehead | Rutherford Institute
1440 Sachem Place
Charlottesville, VA 22901 | (434) 978-3888

Party name: Rutherford Institute, et al.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
OCT 09 2008
OFFICE OF THE CLERK

1008

08-479

No. 08-

IN THE

Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT # 1; KERRY WILSON, husband; JANE DOE WILSON, wife; HELEN ROMERO, wife; JOHN DOE ROMERO, husband; PEGGY SCHWALLIER, wife; JOHN DOE SCHWALLIER, husband,

Petitioners,

v.

APRIL REDDING, legal guardian of minor child,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MATTHEW W. WRIGHT
Counsel of Record
DAVID K. PAUOLE
HOLM WRIGHT HYDE & HAYS PLC
10429 South 51st Street
Suite 285
Phoenix, AZ 85044
(480) 961-0040

Attorneys for Petitioners

218193

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits public school officials from conducting a search of a student suspected of possessing and distributing a prescription drug on campus in violation of school policy.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public school administrator may be liable in a damages lawsuit under 42 U.S.C. § 1983 for conducting a search of a student suspected of possessing and distributing a prescription drug on campus.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION, STATUTE, AND SCHOOL DISTRICT POLICIES INVOLVED	2
STATEMENT OF THE CASE	5
A. Factual Background	5
B. Procedural History	12
REASONS FOR GRANTING THE PETITION	17
I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *T.L.O.*	18

Contents

Page

II. THE DECISION BELOW DEPARTS FROM ESTABLISHED PRINCIPLES OF QUALIFIED IMMUNITY AND WARRANTS THIS COURT'S IMMEDIATE REVIEW. 32

CONCLUSION 37

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed July 11, 2008 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed September 21, 2007 ..... 98a

Appendix C — Order Of The United States District Court For The District Of Arizona Dated March 15, 2005 ..... 126a

Appendix D — Photograph Of Redding's Planner And The Contraband Found Inside 155a

Appendix E — Photograph Of The Prescription Pills And Razor Blade Found On Redding's Friend, Marissa 156a

TABLE OF CITED AUTHORITIES

Page

Cases

Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598 (6th Cir. 2005) 34

Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) 22, 25

Brosseau v. Haugen, 543 U.S. 194 (2004) 34, 36

Camara v. Municipal Court, 387 U.S. 523 (1967) 18

Cornfield ex rel. Lewis v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) 23-24, 35

Hope v. Pelzer, 536 U.S. 730 (2002) 34

Jenkins ex rel. Hall v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997) 36

Malley v. Briggs, 475 U.S. 335 (1986) 34

Morse v. Frederick, 127 S.Ct. 2618 (2007) 22, 33

New Jersey v. T.L.O., 469 U.S. 325 (1985) .... *passim*

Phaneuf v. Fraikin, 448 F.3d 591 (2d Cir. 2006) .. 23

Cited Authorities

Page

Singleton v. Board of Educ. USD 500, 894 F. Supp. 386 (D. Kan. 1995) 35

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) 22

United States v. Martinez Fuerte, 428 U.S. 543 (1976) 22

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) 21, 29, 30

Williams ex rel. Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991) 35

Wilson v. Layne, 526 U.S. 603 (1999) 33

Constitution and Statutes

U.S. Const. Amend. IV ..... i, 2, 17, 21

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... i, 3

Cited Authorities

Page

Other Authorities

Office of National Drug Control Policy, Executive Office of the President, *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (Jan. 2008) 6, 10, 29

Safford Unified School District Policy J-3050 .. 3

Safford Unified School District Policy J-5350 .. 4

INTRODUCTION

In a decision that defies this Court's precedents, the Ninth Circuit now requires probable cause for some searches in the school setting that may be deemed more intrusive. This abrupt change casts a roadblock to the type of swift and effective response that is too often needed to protect the very safety of students, particularly from the threats posed by drugs and weapons. Moreover, the Ninth Circuit upsets the long-standing tradition of deferring to the judgment and expertise of school officials in highly discretionary matters. The result is an opinion wholly uninformed about a disturbing new trend—teens' abuse of prescription and over-the-counter drugs.

The Ninth Circuit also deprived the school administrator of qualified immunity despite a sharp disagreement even among federal judges as to the constitutionality of the search. But to the extent that the administrator made any mistake, it was only in failing to accurately predict the future course of appellate jurisprudence.

Both aspects of the Ninth Circuit's decision have school officials across the country understandably alarmed.

OPINIONS BELOW

The order of the United States District Court for the District of Arizona granting petitioners' motion for summary judgment is reprinted at App. 126a-154a and is not otherwise published. The Ninth Circuit's original opinion affirming the district court is reprinted at App. 98a-125a and is published at 504 F.3d 828. The en banc panel's subsequent opinion reversing the district court is reprinted at App. 1a-97a and is published at 531 F.3d 1071.

JURISDICTION

The Ninth Circuit issued its en banc opinion on July 11, 2008. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE, AND SCHOOL DISTRICT POLICIES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the placed to be searched, and the person or things to be seized.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,. . . .

Safford Unified School District Policy J-3050 provides:

> The nonmedical use, possession, or sale of drugs on school property or at school events is prohibited. *Nonmedical* is defined as "a purpose other than the prevention, treatment, or cure of an illness or disabling condition" consistent with accepted practices of the medical profession.
>
> Students in violation of the provisions of the above paragraph shall be subject to removal from school property and shall be subject to prosecution in accordance with the provisions of the law.
>
> Students attending school in the District who are in violation of the provisions of this policy shall be subject to disciplinary actions in accordance with the provisions of school rules and/or regulations.

> For purposes of this policy, "drugs" shall include, but not be limited to:
>
> • All dangerous controlled substances prohibited by law.
>
> • All alcoholic beverages.
>
> • Any prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy.
>
> • Hallucinogenic substances.
>
> • Inhalants.
>
> Any student who violates the above shall be subject to suspension or expulsion, in addition to other civil and criminal prosecution.

Safford Unified School District Policy J-5350 provides, in pertinent part:

> Under certain circumstances, when it is necessary for a student to take medicine during school hours, the District will cooperate with the family physician and the parents if the following requirements are met:
>
> • There must be a written order from the physician stating the name of the medicine, the dosage, and the time it is to be given.

- There must be written permission from the parent to allow the school or the student to administer the medicine. Appropriate forms are available from the school office.

- The medicine must come to the school office in the prescription container or, if it is over-the-counter medication, in the original container with all warnings and directions intact.

STATEMENT OF THE CASE

A. Factual Background

1. Like many public schools, Safford Unified School District (Safford) finds itself on the front lines of a decades-long war against drug abuse among students. Much of the difficulty in stemming the tide of drug abuse is directly attributable to shifting trends. Students have begun to experiment with drugs at a progressively earlier age, and the drugs of choice have changed. Whereas street drugs used to be the primary concern, more and more students have turned instead to a supplier of a different type—the family medicine cabinet, in search of prescription and over-the-counter (OTC) drugs.

For Safford, the most notable example of this occurred at its middle school in 2002. A female student surreptitiously brought a prescription drug onto campus and began passing the pills out to classmates. The result was any parent's or educator's worst nightmare—a near fatality. A boy had an adverse reaction to the drug,

became seriously ill, and had to be airlifted to Tucson, where he spent several days in an intensive care unit.

Unfortunately, Safford's experience is no random or isolated phenomenon. National studies show a troubling rise in the abuse of prescription and OTC drugs among teens. Office of National Drug Control Policy, Executive Office of the President, *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (Jan. 2008). Teens are now abusing prescription drugs far more than any illicit drug except marijuana. *Id.* at 1-2. In fact, prescription drugs are the drug of choice among 12- to 13-year-olds. *Id.* at 2. These same statistics also correlate with a sharp increase in poisonings and even deaths related to the abuse of prescription and OTC drugs, particularly when these drugs are abused in combination with other substances such as alcohol. *Id.* at 3-4. Moreover, the studies show that this disturbing trend is fueled, in part, by a dangerous myth that these drugs provide a "safe" high. *Id.* at 4-5.

For good reason then, Safford's policies strictly prohibit the nonmedical use or possession of drugs on campus. The term "drugs" includes, but is not limited to, all alcoholic beverages and any prescription or OTC drug except those for which permission to use in school has been granted. Permission requires parental authorization, a physician's order, and delivery of the medication to the school office in either its original or prescription container.

2. The 2003-2004 school year arrived with renewed concerns about drug abuse among students at Safford Middle School. At the opening dance, a small group of eighth-grade students, including Marissa Glines and Savana Redding, stood out for more than just their unusually rowdy behavior. School staff also noticed the distinct stench of alcohol that followed these students around. And before the night ended, a liquor bottle and pack of cigarettes turned up in the trash in the girls' bathroom.

Weeks later, school administrators, including Assistant Principal Kerry Wilson, received a call from the mother of another student, Jordan Romero, requesting a meeting. At the meeting, Jordan's mother described how her son had become violent with her a few nights earlier, and then suddenly sick to his stomach. Jordan explained that his fit of rage occurred after he ingested some pills that a classmate had given to him. He also advised the school administrators that certain students were bringing drugs and weapons onto campus.

Jordan identified students by name, including Marissa and Redding, along with very detailed accounts of their illicit activities. In Redding's case, he reported that she had served alcohol—Jack Daniel's, Black Velvet, vodka, and tequila—at a party that she hosted in her family's camper trailer before the school dance, the same dance at which the stench of alcohol had followed Redding's group around and at which a liquor bottle was found in the girls' bathroom.[1]

---

[1] Redding denies that she served or consumed alcohol the night of the dance, which the courts below properly accepted as (Cont'd)

3. Days after the meeting with Jordan and his mother, Wilson received hard evidence that drugs were again being distributed on campus. Jordan went to see Wilson as school was starting and handed him a white pill that Marissa had just given to him. He told Wilson that there were more pills on campus and that a group of students was planning on taking them at lunch.

Wilson took the pill to the school nurse, Peggy Schwallier, for help in identifying it. She recognized the pill as Ibuprofen 400 mg, which could only be obtained with a prescription.

Wilson went to Marissa's class and asked her to accompany him. As she stood up, he noticed a black planner in the desk next to her and asked the classroom teacher to identify its owner. The teacher discovered several knives and lighters, a cigarette, and a permanent black marker inside the planner, and turned them over to Wilson. App. 155a.

Wilson took the planner and its contents and escorted Marissa to his office, where he invited an administrative assistant, Helen Romero, to observe as Marissa turned out her pockets and opened her wallet. As Marissa did so, she produced a blue pill (later discovered to be Naprosyn 200 mg), several white pills

---

(Cont'd)
true for purposes of the motion for summary judgment and the appeal. But whether Jordan's report is ultimately true or not misses the point and does nothing to change the fact that he made the report and that Wilson had ample reason to believe the report was true.

identical to the one that Jordan had turned in to Wilson, and a razor blade. App. 156a.

Wilson asked Marissa where the blue pill came from. She responded, "I guess it slipped in when *she* gave me the IBU 400s." Wilson asked "who is *she*?" Marissa responded "***Savana Redding***."

Upon further questioning, Marissa denied any knowledge of the planner or its contents. So Wilson went to find Redding while Schwallier and Romero searched Marissa's clothes for any more pills.

Wilson found Redding in class and had her gather her things and come back to his office. There, he showed her the planner and the pills that he had gotten from Jordan and Marissa. Redding admitted that the planner was hers and that she had lent it to Marissa a few days earlier, while denying that the contents were hers.[2] She also denied that she had ever seen the pills before.

Wilson explained to Redding that he had received a report that she had been passing the pills out at school, which she denied. He then obtained her consent to search her backpack, which turned up nothing. Redding's clothes did not have any pockets to check.

---

[2] Redding admits that she lent her planner to Marissa because she wanted to hide cigarettes, a lighter, and jewelry in it. Despite assisting Marissa to conceal such contraband, Redding touts her discipline-free record. Accordingly, her assertion should not be misread to infer that she never broke school rules, only that she was never caught. Moreover, the assertion is of limited probative value given the strong indications that she had recently served alcohol to classmates before the school dance.

4. At that point, Wilson had a decision to make. He confirmed that prescription pills had been distributed again on campus that morning, although he could not be sure who else had pills and in what amounts.[3] Marissa directly implicated Redding as the supplier of the prescription pills, plus another OTC pill, based on personal knowledge as she claimed to have received the pills from her. And Wilson already had a strong basis for suspecting Redding of providing alcohol to students, including Marissa, before the school dance.[4]

Marissa's implication of Redding had the indicia of reliability. Wilson did not offer Marissa leniency in exchange for information, nor did he attempt to coerce her into naming anyone. He simply asked her where the blue pill came from, unsure of whether another student was even involved. And Marissa's reluctant response could hardly be described as exculpatory because it in no way reduced her own guilt; even if she did get the pills from Redding, she was still caught with them in

---

[3] Even with this additional information, educators cannot be expected to know students' full medical histories, including drugs that they may already be taking and any allergies. And educators certainly cannot be expected to have the medical expertise necessary to know all the risks associated with a particular drug or to predict how individual students may react to it.

[4] National studies note the frequent abuse of prescription and OTC drugs together with alcohol. Office of National Drug Control Policy, Executive Office of the President, *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (Jan. 2008).

her possession and had distributed at least one to Jordan. Furthermore, the girls' friendship guarded against an ulterior motive for implicating Redding, and if anything, created a disincentive to implicate her.

As for Redding's denials, one possibility was that they were true, although she did not offer any reason why another student would falsely accuse her. Of course, the other possibility was that her denials were merely self-serving as she sought to avoid responsibility and probable discipline.

Also notable was Redding's admission that the planner was hers and that she had lent it to Marissa a few days earlier. This admission further linked the two as friends and raised a concern that Redding was involved with Marissa in bringing the planner's contents—knives and lighters, a cigarette, and a black permanent marker—onto campus. And if Redding was involved with Marissa in bringing one form of contraband onto campus, it was certainly more likely that she would be involved with Marissa in bringing another form of contraband, i.e. prescription pills, onto campus.

Overlaying all of this, Wilson could recall at least two cases when a student was harmed by ingesting pills distributed on campus. The most recent case was Jordan's just days earlier when he became violent with his mother and sick to his stomach. And the most serious case nearly resulted in a student's death the year prior.

Wilson certainly hoped to avoid a similar result, or worse, for Redding or any other student, particularly

with Jordan's report that the plan was for a group of them to take the pills at lunch. So he asked Romero to take Redding to the nurse's office where she could be searched for any pills that might be discreetly hidden in her clothes.

Romero and Redding entered the nurse's office, and Romero closed and secured the door to prevent anyone from walking in on them. The only other person in the nurse's office, Schwallier, was also female. Romero started by asking Redding to remove her shoes and socks. She then asked Redding to remove her shirt and pants. Finally, Romero asked Redding to pull and shake her bra band as well as the elastic of her underwear. All of this was done without anyone touching Redding.

As soon as Romero was able to confirm that Redding did not have any pills, she immediately returned her clothes so that she could get dressed.

B. Procedural History

1. Redding filed suit in the Superior Court of the State of Arizona. Petitioners timely removed the case to the United States District Court for the District of Arizona and moved for summary judgment.

In granting the motion, the district court concluded that petitioners did not violate Redding's Fourth Amendment rights in any respect as the search complied with the standard set forth by this Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *T.L.O.*, the district court explained, balanced students' interest in privacy against the substantial need of educators to maintain discipline

and order in the school setting and ultimately adopted a reasonableness standard that stopped short of probable cause.

Applying that standard, the district court first considered whether the search was justified at its inception with reasonable grounds for suspecting that the search would turn up evidence that Redding was violating Safford's policies. In light of the totality of information available to Wilson, the court unquestionably determined that the search was justified at its inception with clear grounds for suspecting that Redding was in possession of prescription and OTC drugs in violation of Safford's policies.

Next, the district court considered whether the search was permissible in scope with the measures adopted reasonably related to the objectives of the search and not excessively intrusive in light of Redding's age and sex and the nature of the infraction. In doing so, the court compared the measures adopted to those in several other reported cases and observed that the search for small pills was conducted in the privacy and security of the nurse's office by two female staff members who did not touch Redding in any way. Accordingly, the court also determined that the search was permissible in scope while rejecting Redding's argument that the Fourth Amendment requires employing the least intrusive means possible.

Because Redding's Fourth Amendment rights were not violated, the district court did not make any further inquiry concerning qualified immunity.

2. The Ninth Circuit initially affirmed. Drawing on this Court's precedents, the court of appeals explained that the constitutional rights of students are not coextensive with those of adults in other settings because of the special characteristics of the school environment. It then applied the *T.L.O.* standard to the search and arrived at precisely the same conclusion as the district court.

In considering whether the search was justified at its inception, the court of appeals observed that there were "several key pieces of information tying [Redding] to the possession and distribution of pills in violation of school policy." App. 107a. In particular, the court carefully assessed Marissa's implication of Redding as the supplier and found it credible based on the girls' prior interactions and friendship and Redding's admission that she had lent her planner to Marissa. The court also noted the independent evidence that Redding had recently served alcohol to students, including Marissa, before the school dance.

For the court of appeals, a major factor in assessing the scope of the search was petitioners' "strong interest . . . in safeguarding students entrusted to their care from the harm posed by the misuse of prescription drugs." App. 113a. Moreover, the court acknowledged that petitioners had good cause to be extra vigilant given the prior injuries to students, including a near fatality, from abusing prescription drugs and the report that a group of students was planning to take the pills that day. Finally, the court rejected Redding's argument that the Fourth Amendment required petitioners to utilize the least intrusive means possible.

Like the district court, the court of appeals made no further inquiry concerning qualified immunity because Redding's Fourth Amendment rights were not violated.

3. The Ninth Circuit subsequently reheard the case en banc and again applied the *T.L.O.* standard to the search, but with a different result.

The court of appeals concluded, 6-5, that the search was not justified at its inception. For the majority, the issue was not whether a search was justified at its inception, but rather, whether a strip search was justified at its inception. The majority explained its reframing of the issue this way by reference to intrusiveness. In the majority's view, as the intrusiveness of a search intensifies, so too does the level of suspicion required to justify the search. Using this sliding-scale approach, the majority determined that petitioners failed to meet the heavy burden of justifying the search based on Marissa's implication of Redding, which the majority criticized as self-serving and self-exculpatory. Nor did the majority deem any of the corroborating evidence—Jordan's report that Redding had recently served alcohol to students and contraband hidden in the planner that Redding had lent to Marissa—logically related to the suspicion that Redding was in possession of prescription pills.

The court of appeals further concluded, 8-3, that the search was not permissible in scope. Once again, the overriding factor for the majority was the question of intrusiveness and the potential emotional impact of the search. The majority also opined that the suspected

infraction—possession of prescription pills—"pose[d] an imminent danger to no one." App. 29a. Alternatively, the majority believed that Wilson had effectively neutralized any danger by removing Redding from class and bringing her to his office.

Having determined that Redding's Fourth Amendment rights were violated, the court of appeals proceeded to consider whether those rights were clearly established at the time of the search. The court concluded, 6-5, that they were, thereby depriving Wilson of qualified immunity and subjecting him to trial and possible damages. Unable to find any case on all fours, the majority based its conclusion on *T.L.O.* itself and common sense and reason, which as the majority put it, "supplement the federal reporters." App. 35a. In response, the dissent noted:

> It is of no small consequence to this analysis that three of the first four judges to address this issue found the Redding search to be constitutional, and two more judges of this en banc panel are of the same view. The majority feels that Wilson, with no legal training, should have known better.

App. 92a.

REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons. First, the Ninth Circuit's decision conflicts with *T.L.O.* in a way that (1) places student safety and school order at risk by impairing the ability of school officials to effectively carry out their custodial responsibility, (2) further diverts school officials from the essential task of educating students, and (3) creates enormous confusion for school officials in trying to determine when and how searches may now properly be conducted. The Ninth Circuit's sliding-scale approach effectively requires probable cause for some searches in the school setting that may be deemed more intrusive—with no guidance as to where the dividing line may be—despite this Court's conclusion that "the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." *T.L.O.*, 469 U.S. at 341. Moreover, the Ninth Circuit completely disregarded this Court's direction to lower courts that they defer to school officials' judgment concerning the types of conduct that may threaten student safety and disrupt the school environment. *Id.* at 342 n.9. Instead, the Ninth Circuit, with the benefit of hindsight, substituted its own judgment for Wilson's to reach a result that places it well behind the curve in understanding the shifting trends in drug abuse. The Ninth Circuit's statement that the abuse of a prescription drug "poses an imminent danger to no one" ignores both Safford's experience and national studies, which detail the troubling rise in the abuse of prescription and OTC drugs among teens, while unwittingly fueling the dangerous myth that such drugs provide a "safe" high.

Second, the Ninth Circuit's qualified immunity analysis no longer affords school officials any room for error. Indeed, in the Ninth Circuit, school officials are now subject to a higher standard than federal judges. When the en banc panel concluded, 6-5, that it would have been clear to a reasonable school official in Wilson's position that the search violated Redding's constitutional rights, the majority blinked at the fact that the district court, the original panel, and three dissenting judges all found the search to be constitutional. To make matters worse, the majority turned its back to the existing case law that either supported the constitutionality of the search or granted qualified immunity to officials who conducted searches that were far more clearly unconstitutional.

Both aspects of the Ninth Circuit's decision are deeply troubling and have school administrators and teachers across the country understandably alarmed.

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *T.L.O.*

1. In *T.L.O.*, this Court considered the proper application of the Fourth Amendment to a search conducted by a public school official. 469 U.S. at 327-28. At the outset, the Court explained that context matters and requires "balancing the need to search against the invasion which the search entails." *Id.* at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

The Court rejected the argument that students have no legitimate privacy interest, but also acknowledged

"the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds," especially with the rise in drug use and violent crime in schools. *T.L.O.*, 469 U.S. at 339. Balancing the two, the Court thought it evident that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *Id.* at 340.

Following this reasoning, the Court held that the warrant requirement is unsuited to the school setting because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* But the Court did not stop there. It also concluded that "the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause." *Id.* at 341. "Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *Id.*

The Court set forth a twofold inquiry for this reasonableness standard, asking first whether the search was justified at its inception, and second, whether the search was reasonable in scope. *Id.* A search will ordinarily be justified at its inception when a school official has "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-42. And a search will be permissible in scope "when the measures adopted are reasonably related to

the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342. But in referring to the nature of the infraction, the Court added the following explanation and direction to lower courts:

> We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules. The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. . . . The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

Id. at 342 n.9.

The Court was satisfied that the reasonableness standard struck the appropriate balance between school officials' need to maintain order on the one hand and

students' privacy on the other. *Id.* at 342-43. Of the former, the Court observed that "the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Id.* at 343.

2. In the last twenty plus years, the Court has only reaffirmed *T.L.O.* and its rationale. In *Vernonia School District 47J v. Acton*, the Court rejected a Fourth Amendment challenge to a school policy of conducting suspicionless drug testing of student athletes, which required those chosen at random to urinate under a school official's supervision. 515 U.S. 646, 648, 650, 664-65 (1995). The Court succinctly stated that "Fourth Amendment rights . . . are different in public schools than elsewhere" and later acknowledged that the "most significant element" in deciding that the search was reasonable was the school's role "as guardian and tutor of children entrusted to its care." *Id.* at 656, 665.

The Court further characterized the school's interest in deterring drug use as "important—indeed, perhaps compelling" because "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* 661. Moreover, "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.* at 662.

The Court also rejected the argument that the Fourth Amendment requires the least intrusive search possible. *Id.* at 663. And the Court was not willing to

require individual suspicion before drug testing, in part, because it would "add[] to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation." *Id.* at 664.

More recently, the Court upheld another drug testing policy that applied not just to student athletes, but to any student involved in any competitive extracurricular activity. *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 825 (2002). With the school setting serving as backdrop, the Court explained that "[a] student's privacy interest is limited . . . where the State is responsible for maintaining discipline, health, and safety." *Id.* at 830. The Court observed that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Id.* at 834. And the Court again rejected the argument that the Fourth Amendment requires employing the least intrusive means because it would "raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Id.* at 837 (quoting *United States v. Martinez Fuerte*, 428 U.S. 543, 556-57 n.12 (1976)).

Finally, just last year, the Court held that "[t]he 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." *Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007) (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

As shown, *T.L.O.* clearly remains in effect. Students still have a diminished expectation of privacy in school. And school officials, in carrying out their custodial responsibility, still retain the flexibility to respond swiftly and informally to protect students and maintain order. Rarely will that flexibility be needed more than when school officials confront the threat of drug abuse.

3. In this case, the Ninth Circuit gave lip service to the reasonableness standard, and then instead, subtly applied the very standard that *T.L.O.* rejected—probable cause.

On the first prong, the majority actually conceded that a search of Redding was justified at its inception by acknowledging that "the initial search of [her] backpack and her pockets may have been constitutionally permissible."[5] App. 22a. The majority avoided this conclusion, however, by reframing the issue from whether a search was justified at its inception to whether a strip search was justified at its inception.

As ostensible authority for this reframing of the issue, the majority cited to decisions of the Second and Seventh Circuits for the proposition that as the intrusiveness of a search intensifies, so too does the level of suspicion required to justify the search. *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006); *Cornfield ex*

---

[5] The majority's statement that petitioners searched Redding's pockets is erroneous as her clothes that day had no pockets. Regardless, the majority's belief that such a search would have been constitutionally permissible necessarily means that the search was justified at its inception.

rel. Lewis v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316, 1321 (7th Cir. 1993). The majority also pointed to *T.L.O.* and its analysis of two separate searches.

The majority's supposed authority for reframing the issue is deeply flawed. First, although intrusiveness is certainly relevant to the overall question of reasonableness, *T.L.O.* does not list it as a factor for consideration until assessing the scope of the search under the second prong. 469 U.S. at 341-42. Ignoring this, the majority factored intrusiveness into its analysis under both prongs, and as a result, skewed the balance that this Court struck between school officials' need to maintain order on the one hand and students' privacy on the other. Second, contrary to the majority's assertion, *T.L.O.* did not attribute the two separate searches to a difference in the level of their intrusiveness. The searches were distinct because two different objects were sought, "the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marijuana." *Id.* at 343-44. Indeed, it is difficult to understand how the search for marijuana in T.L.O's purse was any more meaningfully intrusive than the earlier search for cigarettes in the same purse.

The majority's flawed authority resulted in a flawed approach that eschewed *T.L.O.*'s reasonableness standard. If, as the majority advocates, the level of suspicion required to justify a search varies with the intrusiveness of the search contemplated, the result is a sliding scale. On one end of the scale, minimally intrusive searches require only reasonable suspicion for their justification. On the opposite end of the scale,

highly intrusive searches, as the majority deemed the search of Redding to be, require something more than mere reasonable suspicion for their justification.

The majority conveniently avoided giving a name to this newly minted standard for more intrusive searches. But that did little to hide the fact that it is probable cause in application. Perhaps the best evidence of this is the majority's wholesale adoption of criminal precedents, an area of the law where "reasonableness usually requires a showing of probable cause." *Earls*, 536 U.S. at 828.

For example, the majority attacked the primary source of petitioners' suspicion—Marissa's implication of Redding as the supplier of the prescription and OTC pills—by direct reference to criminal precedents analyzing whether informants' tips are sufficiently reliable. Of course, the adversarial relationship between law enforcement officials and criminal suspects is not an apt comparison to the relationship between school officials and students, where "[t]he attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education." *T.L.O.*, 469 U.S. at 349-50 (Powell, J., concurring). Nor are school officials in the practice or habit of cutting deals with students in which leniency is exchanged for information that allows officials to pursue other students who may have broken school rules. And with no apparent ulterior motive given the girls' friendship, Marissa simply had nothing to gain from implicating Redding, falsely or otherwise.

The majority also offered suggestions regarding what more Wilson could have done to corroborate Marissa's statement, including discussing the matter with Redding's teachers, calling her parents, and questioning still more students. But these hypothetical investigations would only have been designed to amass enough evidence to turn reasonable suspicion into probable cause.

Then, in a bit of irony, the majority rejected the corroborating evidence that petitioners did have, including Jordan's report that Redding had recently served alcohol to students and the other contraband found in her planner. Jordan's report of Marissa giving him a pill proved reliable when Wilson found more of the same pill in her possession. And Jordan had also given Wilson a detailed report about Redding serving alcohol to students, including Marissa, at a pre-dance party. The relevance of this report is clear; the suspicion that Redding had previously distributed one type of drug—alcohol—to Marissa and others made it more probable that she was distributing another type of drug—prescription pills—to Marissa and possibly others. The same can be said of the contraband found in Redding's planner. Her admission that she had lent the planner to Marissa further linked the two as friends and raised a concern that she was involved with Marissa in bringing the planner's contents—knives and lighters, a cigarette, and a black permanent marker—onto campus. And if Redding was involved with Marissa in bringing these forms of contraband onto campus, it was more probable that she was involved with Marissa in bringing another form of contraband, i.e. prescription pills, onto campus. The majority, however, refused to see the logic.

4. To make matters worse, when the Ninth Circuit moved to the second prong of *T.L.O.* and assessed whether the search was reasonable in scope, it disregarded this Court's direction to lower courts that they defer to school officials' judgment concerning the types of conduct that may threaten student safety and disrupt the school environment:

> The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

T.L.O., 469 U.S. at 342 n.9.

The majority did not deny that the measures adopted in this case were reasonably related to finding prescription and OTC pills. Indeed, the pills were certainly small enough to be concealed in or under clothing in a way that would avoid superficial detection.

Instead, the majority's concern was with the search's intrusiveness in light of Redding's age and sex.[6]

---

[6] In considering the search's intrusiveness in light of Redding's age and sex, the majority afforded no weight to certain relevant factors, including that the search was conducted in the privacy and security of the school nurse's office by two female staff members who did not touch Redding in any way.

Of course, these factors also have to be considered in proportion to the nature of the infraction, with the search only being unreasonable in scope if it is "*excessively* intrusive." *T.L.O.*, 469 U.S. at 342 (emphasis added).

From Wilson's perspective, the infraction was particularly serious. He was aware of at least two cases when a student was harmed by ingesting pills distributed on campus. The most recent case was Jordan's just days earlier when he became violent with his mother and sick to his stomach. And the most serious case nearly resulted in a student's death the year prior. Moreover, Jordan reported that the plan was for a group of students to take the pills that day, and Wilson still could not be sure who else had pills and in what amounts.

The majority, however, wiped all of this aside in favor of its own judgment about what does and does not pose a threat to student safety and school order, and with the benefit of hindsight not available to Wilson, concluded that this infraction "pose[d] an imminent danger to no one."

5. With the Ninth Circuit defying *T.L.O.* both in its adoption of probable cause for some school searches and its willingness to displace the judgment of school officials in highly discretionary matters, the effects will be far reaching.

First, the Ninth Circuit's decision places student safety and school order at risk by impairing the ability of school officials to effectively carry out their custodial responsibility. "[B]ecause drug use and possession of

weapons have become increasingly common among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel." *T.L.O.*, 469 U.S. at 352-53 (Blackmun, J., concurring). In many instances, that immediate response will no longer be possible as school officials wait for probable cause to exist before conducting a necessary search. *Id.* And the effect of that delay may well prove catastrophic given the obvious harm that drugs and weapons pose.

Moreover, petitioners had previously thought it inarguable that deterring drug abuse is an "important—indeed, perhaps compelling" concern. *Vernonia*, 515 U.S. at 661. But the Ninth Circuit expressed disagreement when it substituted its judgment for Wilson's and concluded that the abuse of a prescription drug "pose[d] an imminent danger to no one." The Ninth Circuit thereby exposed its ignorance of the fact that the abuse of prescription and OTC drugs is one of the dominant new trends in the continuing war against drug abuse.

Teens are currently abusing prescription drugs far more than any illicit drug except marijuana. Office of National Drug Control Policy, Executive Office of the President, *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (Jan. 2008). Among 12- to 13-year olds, prescription drugs are the drugs of choice. *Id.* at 1-2. And these statistics correlate with a sharp increase in poisonings and even deaths related to the abuse of prescription and OTC drugs. *Id.* at 3-4.

Studies show that this disturbing trend is fueled, in part, by the myth that prescription and OTC drugs provide a "safe" high. *Id.* at 4-5. So at the same time that the Ninth Circuit erects barriers to an immediate and effective response from school officials, it further endangers students by unwittingly sending the false though authoritative message that the abuse of these drugs does not place them at risk.

Second, the Ninth Circuit's decision "adds to the ever-expanding diversionary duties of schoolteachers," drawing time, attention, and resources away from education. *Vernonia*, 515 U.S. at 664. Indeed, "[t]he time required for a teacher to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring). Yet this is exactly what the Ninth Circuit advocates in suggesting that Wilson should have done more to corroborate Marissa's implication of Redding by consulting teachers and questioning still more students.

Of course, this even assumes that school officials are up to the task. But "[a] teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause." *Id.* Regardless, school officials now have no choice but to invest the time to educate themselves, instead of their students, on the complexities of probable cause.

Third, the Ninth Circuit's decision creates enormous confusion for school officials in determining when and how searches may now be conducted. With its decision in *T.L.O.*, this Court intended to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause." 469 U.S. at 343. But the Ninth Circuit's sliding-scale approach requires an analysis that is altogether more layered and complex than even probable cause.

This case illustrates the complexity of the analysis following the Ninth Circuit's decision. The majority examined at least two components of the search in isolation—looking through Redding's backpack and then the search of her clothes. It did so as a product of its sliding-scale approach in which the level of suspicion required to justify a search varies with the intrusiveness of the search contemplated. Because the majority apparently did not consider the search of Redding's backpack too intrusive, only reasonable suspicion was required for its justification. But because the majority deemed the search of her clothes to be particularly intrusive, probable cause was required. Accordingly, in addition to understanding probable cause, school officials now also need to understand where one component of a search ends and another begins as well as whether a particular component is intrusive enough to require probable cause instead of mere reasonable suspicion.

These inquiries are so onerous in their minute detail that even the majority failed to faithfully apply its own analysis. For example, one component of this search was asking Redding to remove her shoes and checking them for pills. But the majority never paused to consider this

component in isolation or to opine as to whether this was more or less intrusive. Indeed, the majority offered no guidance as to exactly which component(s) of this search crossed that threshold of intrusiveness, such that probable cause was required as justification.

If the Ninth Circuit is unable to apply its own analysis, there is little hope of school officials being able to. And instead of proceeding "according to the dictates of reason and common sense," their confusion about whether a particular search is now permissible is likely to result in paralyzing inaction. *T.L.O.*, 469 U.S. at 343.

II. THE DECISION BELOW DEPARTS FROM ESTABLISHED PRINCIPLES OF QUALIFIED IMMUNITY AND WARRANTS THIS COURT'S IMMEDIATE REVIEW.

1. Wilson confronted a difficult situation for any school administrator. He confirmed that prescription pills were being distributed on campus, although he could not be sure who else had pills and in what amounts. Marissa directly implicated her friend Redding as the supplier with nothing to gain from doing so. Wilson already had a strong basis for suspecting Redding of having served alcohol to students. Her planner was now sitting open in front of him with knives, lighters, and other contraband. He could recall at least two prior occasions when a student was harmed by ingesting pills distributed on campus, including a near fatality. And his information was that a group of students was planning to take the pills that day.

In a 20-page ruling, the district court agreed that petitioners did not violate Redding's Fourth Amendment rights on these undisputed facts. Like Wilson, the court found reasonable grounds for suspecting that Redding was in possession of prescription and OTC pills in violation of Safford's policies. And in looking to how searches were conducted in several other reported cases, the court also found the search to be permissible in scope.

The original panel of the Ninth Circuit affirmed in a published decision. The panel noted all of the information tying Redding to the possession and distribution of pills and credited petitioners' need to respond swiftly and informally to protect students and maintain order.

On rehearing, a majority of the en banc panel concluded that Wilson, the district court, the original panel, and three dissenting judges all misapprehended the law. But when the majority further concluded, 6-5, that Wilson violated Redding's clearly established rights, it departed from an important guiding principle of the qualified immunity doctrine—"[i]f judges . . . disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999); *see also Morse v. Frederick*, 127 S.Ct. 2618, 2641 (2007) ("Indeed, the fact that this Court divides on the constitutional question (and that the majority reverses the Ninth Circuit's constitutional determination) strongly suggests that the answer as to how to apply prior law to these facts was unclear.") (Breyer, J., concurring in part, and dissenting in part).

At the current count, the Ninth Circuit holds Wilson to a higher standard on understanding the law than five federal judges, including four highly respected members of the court itself with decades worth of combined judicial experience. Given this patently absurd result, it can no longer be said that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

2. In denying Wilson qualified immunity, the Ninth Circuit essentially repeated the same mistake it made in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam). There, it found that a police officer was not entitled to qualified immunity because he had fair warning that his conduct was unlawful based on an existing general principle of law. *Id.* at 195, 199. "Of course, in an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law." *Id.* at 199 (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)). The Ninth Circuit's mistake, however, was in concluding that the officer's particular situation presented a case that was obvious enough to be decided by a general standard alone. *Id.* Accordingly, this Court summarily reversed the Ninth Circuit's finding on qualified immunity. *Id.* at 198 n.3.

Similarly, the majority concluded here that Wilson had fair notice that his conduct was unlawful based solely on *T.L.O.* and its general legal framework. But once again, the majority erred in its assumption that Wilson's particular situation presented a case that was obvious enough to be decided on this basis. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005)

("Accordingly, *T.L.O.* is useful in 'guiding us in determining the law in many different kinds of circumstances'; but is not 'the kind of clear law' necessary to have clearly established the unlawfulness of the defendants' actions in this case."). Indeed, the majority needed to look no further than the prior decisions of the district court and the original panel, to say nothing of the dissent, to see that this case was not even close to being obvious enough to be decided by a general standard alone.

The majority also would have known that this was not an obvious case if it had bothered to consider the body of relevant case law applying *T.L.O.* For example, in *Williams ex rel. Williams v. Ellington*, the Sixth Circuit upheld a "strip search" of a student for an unknown drug even though she did not look disoriented or intoxicated, prior searches of her locker and purse failed to turn up any evidence of drug use, and she denied possession of any drug. 936 F.2d 881, 883, 887 (6th Cir. 1991). Similarly, in *Cornfield ex rel. Lewis v. Consolidated High School District No. 230*, the Seventh Circuit upheld a strip search of a student suspected of "crotching" an unknown drug in a pair of sweatpants. 991 F.2d 1316, 1323 (7th Cir. 1993). In yet another case, a district court upheld a search of a thirteen-year-old boy in which the school official "patted" the boy's crotch, pulled the boy's pants down, and inspected the waistband of his underwear in search of some stolen money. *Singleton v. Board of Educ. USD 500*, 894 F. Supp. 386, 388-89, 390-91 (D. Kan. 1995).

In addition to the cases that support the constitutionality of the search of Redding, there are also

cases that grant qualified immunity to school officials who conducted searches that were far more clearly unconstitutional. For example, in *Jenkins ex rel. Hall v. Talladega City Board of Education*, an en banc panel of the Eleventh Circuit considered the searches of two eight-year-old girls who were asked to remove their clothes not once but twice after being suspected of taking seven dollars from a classmate's purse. 115 F.3d 821, 822-23 (11th Cir. 1997). Declining to decide the constitutionality of the searches, the court nevertheless concluded that the officials were entitled to qualified immunity because *T.L.O.* was not specific enough to place a reasonable official on notice under these circumstances that the search was unlawful. *Id.* at 824-28.

An important lesson emerges here, one that the majority failed to learn even after *Brosseau*. Although a general principle of law—like *T.L.O.*—may control, that is no excuse to ignore the body of relevant case law that has applied that general principle to fact-specific situations. That case law "may provide authority that clearly establishes a right," but it "may also create the legal ambiguity that allows a reasonable official to invoke the protections of the qualified immunity defense." App. 85a.

3. In the majority's view, Wilson, the district court, the original panel, and three dissenting judges all misapprehended the law. But out of all of them, only Wilson is branded a constitutional violator. This is manifestly wrong.

School officials have a difficult enough job maintaining order without the daunting threat of liability

for damages solely because their legal sophistication does not allow them to predict the future course of appellate jurisprudence. Indeed, no one could have foreseen that the Ninth Circuit would defy this Court's controlling authority in *T.L.O.* both in its adoption of probable cause for some school searches and its willingness to displace the judgment of school officials in highly discretionary matters.

In view of the manifest error of the Ninth Circuit's qualified-immunity analysis, this Court may wish to consider summary reversal.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

MATTHEW W. WRIGHT
Counsel of Record
DAVID K. PAUOLE
HOLM WRIGHT HYDE & HAYS PLC
10429 South 51st Street
Suite 285
Phoenix, AZ 85044
(480) 961-0040

Attorneys for Petitioners

October 9, 2008

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 11, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-15759

D.C. No.
CV-04-00265-NFF

APRIL REDDING, legal guardian of minor child,

Plaintiff-Appellant,

v.

SAFFORD UNIFIED SCHOOL DISTRICT # 1; KERRY WILSON, husband; JANE DOE WILSON, wife; HELEN ROMERO, wife; JOHN DOE ROMERO, husband; PEGGY SCHWALLIER, wife; JOHN DOE SCHWALLIER, husband,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Honorable Nancy Fiora, Magistrate Judge, Presiding.

Argued and Submitted
March 26, 2008—San Francisco, California

Filed July 11, 2008

Appendix A

Before: Alex Kozinski, Chief Judge, Harry Pregerson, Michael Daly Hawkins, Barry G. Silverman, Kim McLane Wardlaw, Raymond C. Fisher, Ronald M. Gould, Richard A. Paez, Carlos T. Bea, Milan D. Smith, Jr., N. Randy Smith, Circuit Judges.

Opinion by Judge Wardlaw:
Dissents by Judges Gould and Hawkins

OPINION

WARDLAW, Circuit Judge, with whom Judges PREGERSON, FISHER, PAEZ, M. SMITH, N.R. SMITH join:

On the basis of an uncorroborated tip from the culpable eighth grader, public middle school officials searched futilely for prescription-strength ibuprofen by strip-searching thirteen-year-old honor student Savana Redding. We conclude that the school officials violated Savana's Fourth Amendment right to be free from unreasonable search and seizure. The strip search of Savana was neither "justified at its inception," *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), nor, as a grossly intrusive search of a middle school girl to locate pills with the potency of two over-the-counter Advil capsules, "reasonably related in scope to the circumstances" giving rise to its initiation. *Id.* Because these constitutional principles were clearly established at the time that middle school officials directed and conducted the search, the school official in charge is not entitled to qualified immunity from suit for the unconstitutional strip search of Savana.

Appendix A

I. BACKGROUND

Nestled next to the Pinaleno Mountains in southeastern Arizona, Safford is a small community of slightly under 10,000 residents. With a modest population, Safford maintains a single middle school that draws additional students from other neighboring small towns. In the late summer of 2003, Savana began a new school year as an eighth grader at Safford Middle School along with approximately 200 other thirteen- and fourteen-year-old classmates.[1]

On October 8, Savana was attending math class when Assistant Principal Kerry Wilson opened the classroom door and instructed her to pack up her belongings and accompany him to his office. Savana complied, gathered her things and followed Wilson down the hallway. Upon arriving at Wilson's office, Savana noticed a planner that she had lent a few days earlier to her classmate, Marissa, sitting open on the assistant principal's desk. While Savana immediately recognized the planner, she had not previously seen the objects contained in the planner, including knives, a lighter and a cigarette. None of the objects belonged to Savana.

---

1. As with many middle schools throughout our circuit, Safford Middle School educates sixth through eighth graders. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1430 (1986) (defining middle school as "a division in some private or public schools embracing or approximately embracing the upper elementary grades"). Traditionally, middle school students range in age from eleven to fourteen.

Wilson then began interrogating Savana. Wilson first reminded her of the importance of truth and asked her who owned the planner. Savana admitted that she owned the planner and had lent it to Marissa.[2] Upon further questioning, Savana insisted that none of the objects contained in the planner belonged to her.

Wilson then directed Savana's attention to a few small white ibuprofen pills sitting on his desk. Possession of these pills violated school rule J-3050's prohibition against bringing any prescription or over-the-counter drug onto campus without prior permission. He asked Savana if she had anything to do with the pills. Savana replied that she had never seen those pills before entering Wilson's office. Further, she assured Wilson that she had never brought any prescription pills into the middle school or provided any students with ibuprofen.

Dissatisfied with the results of his questioning, Wilson asked Savana whether he could search her belongings. Savana agreed to this search. Along with his administrative assistant, Helen Romero, Wilson rummaged through Savana's backpack and found nothing. Even though this first search of Savana's backpack supported her statement that she had not brought pills onto campus, and despite Savana's discipline-free history at the school, Wilson asked Romero to take Savana to the nurse's office for a second, more thorough search.

---

2. Savana had let Marissa use the planner because Marissa wanted to hide some things from her parents; specifically, cigarettes, a lighter and some jewelry.

Appendix A

There, at Wilson's behest, Romero and the school nurse, Peggy Schwallier, conducted a strip search of Savana. The officials had Savana peel off each layer of clothing in turn. First, Savana removed her socks, shoes and jacket for inspection for ibuprofen. The officials found nothing. Then, Romero asked Savana to remove her T-shirt and stretch pants. Embarrassed and scared, Savana complied and sat in her bra and underwear while the two adults examined her clothes. Again, the officials found nothing. Still progressing with the search, despite receiving only corroboration of Savana's pleas that she did not have any ibuprofen, Romero instructed Savana to pull her bra out to the side and shake it. Savana followed the instructions, exposing her naked breasts in the process. The shaking failed to dislodge any pills. Romero next requested that Savana pull out her underwear at the crotch and shake it. Hiding her head so that the adults could not see that she was about to cry, Savana complied and pulled out her underwear, revealing her pelvic area. No ibuprofen was found. The school officials finally stopped and told Savana to put her clothes back on and accompany Romero back to Wilson's office. Savana did not freely agree to this search. She was "embarrassed and scared, but felt [she] would be in more trouble if [she] did not do what they asked." In her affidavit, Savana described the experience as "the most humiliating experience" of her short life, and felt "violated by the strip search."

The long and attenuated route to Savana began at the school dance held to celebrate the beginning of the new academic year. There, school officials detected the

smell of alcohol around a small group of students, including Savana and her classmate Marissa, and became concerned that they may have drunk alcohol either before or during the school function. Increasing their suspicion of alcohol use that night, school officials found a bottle of alcohol, along with a pack of cigarettes, in the girls' bathroom. Nothing, however, specifically linked Savana or any other individual student to the empty bottle. Nevertheless, school officials remained wary that students were violating school rule J-3050, which prohibits the possession of alcohol and the non-medical use, possession, or sale of a drug, among other school rules. Enforcement of these school regulations drove the public school officials' increased efforts toward rooting out the ibuprofen.

On October 1, nearly a month and a half after the dance, and a week before the search of Savana, Jordan, a student at Safford Middle School, and his mother requested a meeting with Principal Robert Beeman and Wilson. During the meeting, Jordan's mother recounted how her son had become violent and gotten sick to his stomach a few nights earlier. Jordan had confessed to his mother that he became sick after ingesting pills he received from some unspecified classmate. More generally, Jordan advised the school administrators that "certain students" brought drugs and weapons on campus. Nothing in the record indicates that Jordan suggested Savana was among the students bringing drugs into the middle school. To the contrary, Jordan

brought up Savana's name only to accuse her family of providing alcohol to other students before the opening dance, an allegation the Reddings deny.[3]

Before the opening bell on the day of the strip search, Jordan approached Assistant Principal Wilson with a small white pill. Jordan explained that Marissa—he did not mention Savana's name—had just given him the pill, and that a group of students planned to take the pills at lunchtime. Consistent with events he recounted during his meeting with Wilson the previous week, Jordan did not link Savana with possession of any pills or the plan for their distribution that day. Wilson then walked down the hall to ask Nurse Schwallier if she could identify the pill. Schwallier recognized it as 400 mg ibuprofen, obtainable only by prescription. Ibuprofen is most commonly found in over-the-counter Advil or Motrin in 200 mg pills to treat headaches, muscle-aches, or, for many young women, menstrual cramps. *See* PDR for NONPRESCRIPTION DRUGS, DIETARY SUPPLEMENTS, AND HERBS 725-26 (29th ed.2008).

Wilson then walked toward Marissa's classroom to question her about the ibuprofen. Interrupting the class, Wilson asked Marissa to gather her things and

---

3. Because the School District brought the motion for summary judgment, we must construe the record in the light most favorable to the Reddings. *See Bank of New York v. Fremont Gen. Corp.*, 523 F.3d 902, 909 (9th Cir.2008) ("[W]e must view the evidence on summary judgment in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party.").

accompany him to his office. As Marissa collected her belongings, Wilson noticed a black planner in the desk situated next to her. He asked the classroom teacher to determine the owner of the planner. Opening the planner, the classroom teacher found small knives, a cigarette lighter and a cigarette. No pills, however, were found in the planner. Wilson took the planner and Marissa to his office.

Once back in his office, Wilson asked Romero to observe while Marissa followed Wilson's direction to turn out her pockets and open her wallet. This search revealed several white ibuprofen pills identical to the one turned over by Jordan, along with a blue Naprosyn 200 mg pill.[4] Wilson asked Marissa how she obtained the blue pill. Caught red-handed with pills in violation of school rules, Marissa responded, "I guess it slipped in when *she* gave me the IBU 400s." Wilson asked, "Who is *she?* "Marissa responded "Savana Redding." Marissa, however, did not indicate to Wilson that Savana currently had any pills on her person, or, more specifically, had hidden pills in a place where a strip search would locate them.

Wilson then asked Romero to escort Marissa down to Nurse Schwallier's office for a more intensive search for additional ibuprofen pills. Romero asked Marissa to

---

4. Naprosyn, like ibuprofen, is used to treat pain and inflammation. *See* PHYSICIAN'S DESK REFERENCE 2725 (62nd ed.2008). It is most commonly found in Aleve, a popular over-the-counter choice to treat discomfort related to menstrual cramps.

remove her socks and shoes so that they could be searched. Marissa complied. Then Romero asked Marissa to pull up her shirt and pull out the band of her bra. Finding nothing, Romero lastly asked Marissa to take off her pants and stretch out the elastic on her underwear. The search failed to reveal any additional ibuprofen.[5] After this search, Wilson and the school officials turned their attention to Savana.

The crucial link—indeed, the only link—between Savana and the ibuprofen was Marissa's statement upon being caught with the pills that the ibuprofen (and the blame) was not hers, but rather was Savana's. Before Marissa implicated Savana, there had been no connection between Savana and the circulating rumors of prescription drugs on campus. Savana had never been disciplined for any infraction of school rules, let alone possession or distribution of drugs. The tip provided by Jordan only linked Marissa to the ibuprofen and failed to include any mention of Savana. Indeed, even the planner Savana lent to Marissa failed to provide any connection between Savana and any ibuprofen because the pills had been found on Marissa's person, not inside the planner. Nevertheless, on the sole basis of Marissa's

---

5. Inexplicably, although Marissa was the one found with the pills, the search conducted on Marissa was less intrusive than that later conducted on Savana, whose only link to the pills was Marissa's uncorroborated "tip." School officials asked Marissa only to lift her shirt, not to remove it entirely, as they did with Savana. The third student suspect was a boy named Chris. He was the only student suspected of the same infraction that day not required to strip for the school officials' inspection.

attempt to shift the school officials' focus off herself and onto Savana, and without additional questioning or investigation, Wilson directed his assistant and the school nurse to require a thirteen-year-old to disrobe.

Upset after hearing what happened to her daughter, April Redding, Savana's mother, made an appointment with the school administrators. Apparently unsatisfied by the meeting, the Reddings brought suit in the District Court for the District of Arizona against Safford Unified School District # 1, Wilson, Romero and Schwallier (collectively, "Appellees").

Appellees ultimately filed a motion for summary judgment, asserting that the defense of qualified immunity precluded them from suit. Defendants' motion relied solely on the argument that the strip search did not violate Savana's Fourth Amendment rights, and "because there was no constitutional violation, no further inquiry is necessary." In a series of declarations, Wilson, Romero and Schwallier attempted to justify the strip search of Savana with a general concern that "[t]he school has a history of problems with students using and distributing prohibited and illegal substances on campus," and a uniform recounting of events—none of which remotely connected Savana with the presence of ibuprofen on the middle school campus that day.

The district court ruled for defendants entirely on the basis that there was no violation of Savana's constitutional right, as established by *T.L.O.*, to be free from unreasonable searches in school. It accepted as

sufficient Appellees' representation that Savana's decision to lend Marissa her planner provided a sufficient nexus between the two girls to corroborate Marissa's tip. The district court reasoned that this connection justified the strip search at its inception by providing Appellees with reasonable grounds for suspecting that a strip search of Savana would turn up the ibuprofen. Moreover, the district court concluded that the need to locate the ibuprofen was sufficiently urgent that the strip search was "reasonably related" to the search's objective and was not "excessively intrusive." The conclusion that Savana's constitutional rights were not violated rendered consideration of the second step of qualified immunity—whether the right was clearly established—unnecessary.

Upon appeal, a divided panel of our court upheld the grant of summary judgment in favor of Appellees. The two-judge majority—in a now vacated opinion-concluded that "[a]mple facts supported Marissa's veracity as an informant," justifying Wilson's subsequent search of Savana, including her ownership of the planner and the disputed allegations of her distribution of alcohol to students. *Redding v. Safford Unified Sch. Dist. # 1*, 504 F.3d 828, 834 (9th Cir.2007), *r'hg en banc granted*, 514 F.3d 1383. The majority found the strip search permissible in scope because "the strong interest" in protecting students from prescription drugs outweighed the intrusion caused by the search the panel thought was conducted in a "reasonable manner." In dissent, Judge Thomas asserted that the majority had misapplied Supreme Court authority. While *a* search

may have been justified, the panel failed to undertake "the appropriate inquiry [of] whether a *strip search* was justified." *Id.* at 837 (Thomas, J. dissenting). Because it "was unreasonable to force Savana, a thirteen-year-old girl, to expose her breasts and pubic area to school officials" while they searched for ibuprofen, Judge Thomas concluded that the strip search failed to meet constitutional muster under *T.L.O. Id.* at 838.

A majority of our judges in regular active service voted to reconsider en banc whether the strip search violated Savana's Fourth Amendment rights, and, if so, whether those rights were clearly established in October 2003, when the school officials conducted the strip search. *See* FED. R. APP. P. 35. We now consider these questions en banc.

II. DISCUSSION

The Supreme Court has instructed that lower courts follow a careful two-step process when evaluating assertions of qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). First, we determine whether "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir.2002) (quoting *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151). If we answer that question in the affirmative, we then answer whether the violated right

was "clearly established."[6] *Id.* We review de novo the district court's grant of summary judgment on the basis of qualified immunity. *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir.2007).

A. The Constitutionality of the Strip Search

In 1985, the United States Supreme Court held: "It is now beyond dispute that the Federal Constitution, by the virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers. Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials." *T.L.O.*, 469 U.S. at 334, 105 S.Ct. 733 (internal quotation marks and citations omitted). The Court stated "[t]hat[schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.* (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)).

---

6. Because the district court and the majority of the three judge panel decided that a constitutional right was not violated, we, sitting en banc, are required to decide that question. It is of no consequence at this juncture of the appeal in which order the *Saucier* questions are addressed. It is not necessary, therefore, to defer decision pending the Supreme Court's decision whether to overrule *Saucier*'s two-step inquiry. *See Pearson v. Callahan*, __ U.S. __, 128 S.Ct. 1702, 170 L.Ed.2d 512, 2008 WL 754340 (Mar. 24, 2008).

To implement these principles, the Court established "the proper standard for assessing the legality of searches conducted by public school officials." *Id.* at 328, 105 S.Ct. 733. Whether school officials subject a student to a search of her purse, as in *T.L.O.*, or strip a student of clothing, the Constitution mandates that the search meet the generalized requirement of "reasonableness, under all the circumstances, of the search." *Id.* at 341, 105 S.Ct. 733. The Court recognized that what is reasonable requires a balancing of interests: "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order." *Id.* at 337, 105 S.Ct. 733. Noting that "even a limited search of the person is a substantial invasion of privacy," *id.* (citing *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)), the Court emphasized that "[a] search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." *Id.* at 337-38, 105 S.Ct. 733. Weighed against the students' substantial interest in privacy is the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."[7] *Id.* at 339, 105 S.Ct.

---

7. Judge Hawkins's dissenting opinion gives little weight to the substantial privacy interests of the child identified by the Supreme Court, focusing almost entirely on the school's interest in order. Yet the Supreme Court instructed that the reasonableness standard involved two equally important goals:

(Cont'd)

733. To accommodate the school context, the Court concluded that the "public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." *Id.* at 341, 105 S.Ct. 733.

The Court set forth a twofold inquiry to gauge reasonableness: "[F]irst, one must consider 'whether the . . . action was justified at its inception;' second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.' " *Id.* (citations omitted). The Court further held that a search will be permissible in its scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342, 105 S.Ct. 733. The Court crafted this test to "neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of school children." *Id.* at 342-43, 105 S.Ct. 733.

While Judge Hawkins's dissenting opinion characterizes *T.L.O.*'s standard as designed to "spare teachers and school officials the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates

---

(Cont'd)

preserving the school's need for order while ensuring that the "interests of students would be invaded no more than is necessary" to preserve such order. *Id.* at 343, 105 S.Ct. 733.

of reason and common sense," Hawkins Dissent *infra* at 1091, it pays scant attention to the critically important statement of the Court that immediately follows this quoted sentence in the *T.L.O.* opinion: "*At the same time,* the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.* at 343, 105 S.Ct. 733 (emphasis added).

Nowhere does the *T.L.O.* Court tell us to accord school officials' judgments unblinking deference. Nor does *T.L.O.* provide blanket approval of strip searches of thirteen-year-olds remotely rumored to have had Advil merely because of a generalized drug problem. Rather, the Court made it clear that while it did not require school officials to apply a probable cause standard to a purse search, it plainly required them to act "according to the dictates of reason and common sense." *Id.* As discussed below, the public school officials who strip searched Savana acted contrary to all reason and common sense as they trampled over her legitimate and substantial interests in privacy and security of her person.

1. Public School Officials Conducted a Strip Search of Savana.

Let there be no doubt: the Safford school officials conducted a strip search of Savana. Judge Hawkins's dissenting opinion squeamishly avoids facing the reality of the nature of the search. Our designation of Savana's

search as a strip search is supported by federal and state law, as well as secondary authority. Savana did not have to be completely naked for the school officials to have strip searched her. The Eleventh Circuit has considered a police officer's direction for someone to strip down to their underwear to be a "strip search." *See Justice v. City of Peachtree City*, 961 F.2d 188, 190 (11th Cir.1992). Likewise, the Fourth Circuit understands a search of an adult arrestee in his boxer shorts to be a strip search. *See Amaechi v. West*, 237 F.3d 356, 363 (4th Cir.2001) (citing *United States v. Dorlouis*, 107 F.3d 248, 256 (4th Cir.1997)). The First Circuit "recognize[s] that a strip search may occur even when an inmate is not fully disrobed." *See Wood v. Hancock County Sheriff's Dep't.*, 354 F.3d 57, 63 n. 10 (1st Cir.2003).

Statutes defining a strip search in several states confirm our understanding of the term "strip search." California, for instance, defines the term as "requir[ing] a person to remove or arrange *some or all* of his or her clothing so as to permit a visual inspection of the *underclothing*, breasts, buttocks, or genitalia of such person." CAL. PENAL CODE § 4030 (emphasis supplied); *see also, e.g.*, CONN.GEN. STAT. § 54-33k;725 ILL. COMP. STAT. 5/103-1; MO. REV. STAT. § 544.193; N.J. STAT. ANN. 2A:161A-3; VA. CODE ANN. § 19.2-59.1; WASH. REV. CODE § 10.79.070. The Fourth Circuit has recognized that this definition of a strip search is "uniform" throughout the Union. *See Amaechi*, 237 F.3d at 365 n. 15.

Black's Law Dictionary defines a "strip search" as "[a] search of a person conducted after that person's clothes have been removed, the purpose usually being to find any contraband the person might be hiding." *See* BLACK'S LAW DICTIONARY 1378-79 (8th ed.2004).

Savana was required by the public school officials to disrobe and expose the parts of her body underneath her underwear so that school officials could potentially find ibuprofen. The term may unsettle the sensibilities of our dissenting colleagues; however, the accuracy of the designation merely cements the intrusiveness of what occurred. And, even if our dissenting friends want to quibble about the term, the search of Savana by any other name would be equally as unreasonable.

2. Was the Strip Search Justified at Its Inception?

"Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *T.L.O.*, 469 U.S. at 341-42, 105 S.Ct. 733. Reasonableness, of course, depends on context. We agree with the Seventh Circuit that *T.L.O.* requires that "as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of

reasonableness for a nude search."[8] *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir.1993). The Second Circuit also agrees with this approach: "Although *T.L.O.* held that reasonable suspicion is the governing standard, the reasonableness of the suspicion is informed by the very intrusive nature of a strip search, requiring for its justification a high level of suspicion." *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir.2006) (citation omitted).

Here, as in *T.L.O.*, the school officials engaged in two related searches: first, a search of Savana's backpack and her pockets, which does not give rise to the claims in the complaint, and second, a strip search, which forms the basis of the complaint.[9] *See T.L.O.*, 469 U.S. at 345, 105 S.Ct. 733 ("The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marihuana."). A review of the facts found in *T.L.O.*, and the Court's reasoning regarding the progression of the

---

8. Notably, at least seven states—including two in this Circuit—have concluded that strip searches of school children are *never* permissible for *any* reason. *See* CAL. EDUC. CODE § 49050; IOWA CODE § 808 A.2(4)(A); OKLA. STAT. TIT. 70, § 24-102; N.J. STAT. ANN. § 18A:37-6.1; S.C. CODE ANN. § 59-63-1140; WASH. REV. CODE § 28A.600.230(3); WIS. STAT. § 948.50(3).

9. That the dissent chooses to merge the two searches into one with an increasing degree of intrusiveness does little to advance the analysis of *T.L.O.* and its application to the strip search here.

first search of T.L.O. to the second, supports the conclusion that while reasonable suspicion may very well have justified the initial search of Savana's backpack and the emptying of her pockets, it was unreasonable to proceed from this first search to a strip search.

In *T.L.O.*, a high school teacher discovered two girls smoking in a lavatory in violation of a school rule. 469 U.S. at 328, 105 S.Ct. 733. In response, the teacher brought the two girls down to the principal's office to discuss the infraction with the high school's vice principal. While T.L.O.'s friend admitted to smoking, in violation of a school rule, T.L.O. denied the allegation. *Id.* To determine whether to believe the denial, the vice principal brought T.L.O. into his private office and asked to see her purse. *Id.* As he opened the purse, the vice principal found a pack of cigarettes. *Id.* Reaching in for the cigarettes, the vice principal further discovered a package of rolling papers, closely associated with the use of marijuana. *Id.*

Having discovered indications that T.L.O.'s previous denial was false and that she possessed drug paraphernalia, the vice principal began a second and more intrusive search of T.L.O.'s purse. *Id.* This second search revealed "a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing." *Id.*

The Court reasoned that the initial search of T.L.O.'s purse was reasonable because a teacher had reported that this particular student was smoking in the bathroom. *Id.* at 345-46, 105 S.Ct. 733. This report gave the vice principal reason to suspect T.L.O. had cigarettes on her person, and "if she did have cigarettes, her purse was the obvious place in which to find them." *Id.* at 346, 105 S.Ct. 733. This first search revealed not only corroboration of the vice principal's suspicion that T.L.O. was carrying cigarettes, but, by the discovery of rolling papers, also provided additional reasonable suspicion that T.L.O. may possess marijuana, thereby justifying a second, more intrusive search. Because the first search revealed information that supported reasonable suspicion that she possessed contraband, the Court concluded that "further exploration of T.L.O's purse" was justified. *Id.* at 347, 105 S.Ct. 733.

The causal link permitting the vice principal to proceed from his first, less intrusive search to a second, more thorough search—the discovery of cigarettes and rolling papers—is entirely absent here. The initial search of Savana's backpack (which, like T.L.O.'s purse, were "the obvious place[s]" to find pills) did not turn up any ibuprofen. The *T.L.O.* Court concluded that the second search was reasonable because the preliminary search provided physical evidence supporting the vice principal's suspicion. Of course, the discovery of cigarettes also provided the vice principal with good reason to discount the veracity of T.L.O.'s denials. Here no such causal link existed. To the contrary: the initial search of Savana revealed nothing to suggest she

possessed pills or that she was anything less than truthful when she emphatically stated she had never brought pills into the school. Following the logic of *T.L.O.*, the initial search of Savana's backpack and her pockets may have been constitutionally permissible. That initial search, however, is not the search currently before us. Rather, we must analyze whether the subsequent strip search was justified at *its* inception.

Absent the sort of physical evidence found in *T.L.O.*, the primary purported justification for the strip search was Marissa's statement that Savana had given her the ibuprofen that she was caught with in violation of the school's rule. This self-serving statement, which shifted the culpability for bringing the pills to school from Marissa to Savana, does not justify initiating a highly invasive strip search of a student who bore no other connection to the pills in question. We do not treat all informants' tips as equal in their reliability. *See Adams v. Williams*, 407 U.S. 143, 147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Rather, "[w]hen a court is considering whether an informant's tip is sufficient to support a finding of probable cause or reasonable suspicion, the court must employ a 'totality-of-the-circumstances approach' that takes into consideration the informant's 'veracity' or 'reliability' and his 'basis of knowledge.' " *United States v. Rowland*, 464 F.3d 899, 907 (9th Cir.2006). For good reason, we are most suspicious of those self-exculpatory tips that might unload potential punishment on a third party. *See Lilly v. Virginia*, 527 U.S. 116, 133, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) ("It is clear that our cases consistently have viewed an

accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those [categories of trustworthy statements]."). Our concerns are heightened when the informant is a frightened eighth grader caught red-handed by a principal. This is particularly so when the student implicates another who has not previously been tied to the contraband and, more generally, has no disciplinary history whatsoever at the school. More succinctly, the self-serving statement of a cornered teenager facing significant punishment does not meet the heavy burden necessary to justify a search accurately described by the Seventh Circuit as "de-meaning, dehumanizing, undignified, humiliating, terrifying, unpleasant [and] embarrassing." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir.1983).

At a minimum, Assistant Principal Wilson should have conducted additional investigation to corroborate Marissa's "tip" before directing Savana into the nurse's office for disrobing. *See Williams by Williams v. Ellington*, 936 F.2d 881, 888-89 (6th Cir.1991) ("While there is concern that students will be motivated by malice and falsely implicate other students in wrongdoing, that type of situation would be analogous to the anonymous tip. Because the tip lacks reliability, school officials would be required to further investigate the matter before a search or seizure would be warranted."); *Phaneuf*, 448 F.3d at 598-99 ("While the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search."). This need for further

investigation is particularly heightened here because the initial tip provided no information as to whether Savana currently possessed ibuprofen pills or was hiding them in a place where a strip search would reveal them. *See T.L.O.*, 469 U.S. at 346, 105 S.Ct. 733 (recognizing distinction between reasonable places to search—such as purses—and other, less reasonable places). Several avenues were available for Wilson to follow up on Savana's general statement, including discussions with Savana's teachers, conversations with Savana's parents, or further questioning of other students. Certainly, the only "corroboration" Wilson received—Savana's adamant denial of possessing ibuprofen and a fruitless search of her backpack—did not serve to bolster the tip's reliability to a degree sufficient to justify a further and more intrusive search.

Nor are we persuaded that either Savana's admission that she lent Marissa the planner or any disputed allegation that she served alcohol six weeks before Marissa was found with the pills provided reasonable grounds to believe that a strip search of Savana would reveal ibuprofen. The planner that Savana lent to Marissa had not been used by Marissa to conceal ibuprofen. The ibuprofen, rather, had been concealed in Marissa's pockets, consistent with the information provided by Jordan linking Marissa alone to the ibuprofen.[10] That Savana lent a planner to

10. Judge Hawkins inconsistently embraces Jordan's credibility when it serves his cause of attempting to discredit Savana with the months-earlier alcohol allegation but is quick

(Cont'd)

Marissa—in which Marissa concealed objects that violated Safford school rules—does not make it significantly more likely that Savana had anything to do with the pills carried in Marissa's pockets. Judge Hawkins's dissenting opinion appears satisfied that the planner cements Savana's friendly relationship with Marissa, and therefore makes Savana's involvement in pill distribution more likely. This is nothing more than "guilt-by-association," certainly too thin of a reed for such a substantial intrusion into Savana's expectations of privacy. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178, 71 S.Ct. 624, 95 L.Ed. 817 (1951) ("The technique is guilt by association—one of the most odious institutions of history. . . . Guilt in our system is personal."). Moreover, Marissa's compounding number of school rule violations should reasonably have cast more suspicion on her own culpability, further undermining the reliability of her accusation of Savana. Further, Savana's mother had denied the family's involvement in providing alcohol to any student before the August school dance.[11] Nevertheless, even if Savana

(Cont'd)
to dismiss Jordan when his statements support Savana's credibility and complete innocence. The dissent accepts Jordan's recollection of Savana's party a month and a half earlier to suggest that Savana provided students with alcohol, yet does not give the same force to Jordan's statement that earlier that very day Marissa—and not Savana—had given him the ibuprofen.

11. Again, because we accept the facts of the party opposing qualified immunity to determine whether a constitutional violation could be found, we credit this account of events. *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151.

had provided alcohol to students in August, that event does not make it more likely that an October strip search would reveal ibuprofen pills hidden in Savana's underwear. *See Phaneuf*, 448 F.3d at 600 ("The school acted unreasonably in treating all contraband alike: Surely, a discovery of cigarettes cannot alone support a suspicion that a student is carrying a firearm or is bootlegging gin. Without further explanation, the school cannot vault from the finding of one type of (commonly used) contraband, to a suspicion involving the smuggling of another.").

Comparing the facts leading to Savana's strip search to justifications offered for similar searches examined by our sister circuits further bolsters our conclusion that this strip search was not justified at its inception. In *Cornfield*, the Seventh Circuit found justifiable at its inception a strip search of a sixteen-year-old male enrolled in a high school behavioral disorder program. 991 F.2d at 1319. There, a disinterested teacher's aide observed that the student was "too well-endowed," suggesting that the student might be "crotching" drugs. *Id.* Information from third parties buttressed this observation, including another student's report that Cornfield had brought drugs onto campus, and a teacher's report that Cornfield admitted he had previously dealt drugs as well as "crotched" drugs during a police raid at his mother's house. *Id.* at 1322. Moreover, the local police had reported to the school that they received information that Cornfield was selling marijuana to other students. *Id.* Perhaps most importantly, the information provided a basis to believe

that a strip search was necessary to reveal the contraband. These factors-teacher observations indicating the contraband was hidden in Cornfield's underwear, tips from impartial students, police reports, and previous student admissions-all distinguish Cornfield's search from that of Savana, whose only tie to the ibuprofen in question was Marissa's statements, which in this context, were unreliable.

Indeed, in *Phaneuf*, the Second Circuit struck down as unjustified a strip search of an eighteen-year-old girl as unjustified with facts far more favorable to the school officials than those present here. There, a disinterested student provided a tip to a teacher that Phaneuf, a student with a history of disciplinary problems, planned to stuff marijuana down her pants that day to take along with her on the senior class picnic. *Phaneuf*, 448 F.3d at 593. Although the school had a specific tip that the student was currently hiding drugs where only a strip search could discover them, and the school called the student's mother to perform the search, the Second Circuit determined that a student tip, even when not seeking to shift blame, justified only further inquiry and not a "step as intrusive as a strip search." *Id.* at 599. The circumstances the public school officials confronted here provided even less justification than those rejected in *Phaneuf*, considering the source of the tip, the content of the tip (including no information that Savana currently possessed pills in a place where a strip search would reveal them) and the history of the student in question.

The school initiated a strip search of Savana on the basis of an unsubstantiated tip from Marissa, a student seeking to shift blame from herself to Savana. Other facts marshaled by the school district—allegations of alcohol use months earlier, Jordan's tip that Marissa provided him with a pill, and Marissa's hidden contraband in a planner Savana lent her-are logically unrelated to a reasonable belief that Savana was hiding pills on her person. For these reasons, we hold that the strip search of Savana was unjustified at its inception.

3. Was the Strip Search Reasonable in Scope?

Nor was the strip search "reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 U.S. at 341, 105 S.Ct. 733 (internal quotation mark and citation omitted). The scope of a search is permissible only if "the measures adopted are reasonably related to the objectives of the search and *not excessively intrusive in light of the age and sex of the student and the nature of the infraction.*" *Id.* at 342, 105 S.Ct. 733 (emphasis added). Here, the public school authorities adopted a disproportionately extreme measure to search a thirteen-year-old girl[12] for violating a school rule

12. *T.L.O.* requires us to measure the intrusiveness of the search in light of the "age and *sex*" of the student. Here, the gender of the students suspected of possessing ibuprofen did make a difference: only the girls were asked to disrobe. Chris, a male student, was asked only to empty his pockets, shake out his shirt and shake his pants up and down. That Savana was subjected to a *more* intrusive search than that deemed necessary for the boy renders it all the more unreasonable.

prohibiting possession of prescription and over-the-counter drugs. We conclude the strip search was not reasonably related to the search for ibuprofen, as the most logical places where the pills might have been found had already been searched to no avail, and no information pointed to the conclusion that the pills were hidden under her panties or bra (or that Savana's classmates would be willing to ingest pills previously stored in her underwear). Common sense informs us that directing a thirteen-year-old girl to remove her clothes, partially revealing her breasts and pelvic area, for allegedly possessing ibuprofen, an infraction that poses an imminent danger to no one, and which could be handled by keeping her in the principal's office until a parent arrived or simply sending her home, was excessively intrusive.

Along with our sister circuits, we have long recognized the psychological trauma intrinsic to a strip search. "The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute." *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1446 (9th Cir.1989) (challenging a strip search of an adult after arrest for grand-theft auto). As the Tenth Circuit has explained, "[t]he experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state . . . can only be seen as thoroughly degrading and frightening." *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir.1993) (challenging strip search policy of Oklahoma jail). That Savana's search took place in a

nurse's office in front of two women does not remove the sting of the procedure. *See Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir.1982) ("Indeed, a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience.").

These concerns, pressing and legitimate when strip searches are conducted on adults in prison, are magnified when strip searches are performed on school children. As the Supreme Court has noted: "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). As adolescents enter puberty, "they become more conscious of their bodies and self-conscious about them. Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older." *Cornfield*, 991 F.2d at 1321 n. 1. "[N]o one would seriously dispute that a nude search of a child is traumatic." *Id.* at 1321.

As Amicus National Association of Social Workers informs us, psychological research supports these judicial observations. "Clinical evaluations of the [young] victims of strip searches indicate that they can result in serious emotional damage, including the development of, or increase in, oppositional behavior." Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCHOOL

PSYCHOLOGY 7, 13 (1998). "Psychological experts have also testified that victims often suffered post-search symptoms including sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions, and that some victims have been moved to attempt suicide." Stephen F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 12 (1991) (internal quotation marks omitted). Moreover, that the student is "viewed rather than touched, do[es] not diminish the trauma experienced by the child." Jess Ann White, *A Study of Strip Searching in Pennsylvania Public Schools and an Analysis of the Knowledge, Attitudes, and Beliefs of Pennsylvania Public School Administrators Regarding Strip Searching* 37 (2000) (on file with the Temple University Graduate Board). The overzealousness of school administrators in efforts to protect students has the tragic impact of traumatizing those they claim to serve.

And all this to find prescription-strength ibuprofen pills. We reject Safford's effort to lump together these run-of-the-mill anti-inflammatory pills with the evocative term "prescription drugs," in a knowing effort to shield an imprudent strip search of a young girl behind a larger war against drugs. Contrary to Judge Hawkins's assertion, we are not "implicitly express[ing] disagreement" with the Safford Middle School's policy J-3050. Rather, we are following *T.L.O.*'s dictate to evaluate whether a search is "excessively intrusive in light of the . . . nature of the infraction." *T.L.O.*, 469 U.S.

at 342, 105 S.Ct. 733. Nothing in the record provides any evidence that the school officials were concerned in this case about controlled substances violative of state or federal law. No legal decision cited to us or that we could find permitted a strip search to discover substances regularly available over the counter at any convenience store throughout the United States. *See, e.g., Williams,* 936 F.2d at 882 (considering a strip search to discover either cocaine or a vial of "Rush"); *Cornfield,* 991 F.2d at 1323 (reviewing a strip search conducted to find marijuana or other controlled substances); *Phaneuf,* 448 F.3d at 593 (rejecting a strip search to uncover marijuana). And contrary to any suggestion that finding the ibuprofen was an urgent matter to avoid a parade of horribles, even if Savana had possessed the ibuprofen pills, any danger they posed was neutralized once school officials seized Savana and held her in the assistant principal's office. Savana had no means at that point to distribute the pills, and whatever immediately threatening activity the school may have perceived by the alleged possession of prescription-strength ibuprofen had been thwarted. The school officials had only to send Savana home for the afternoon to prevent the rumored lunchtime distribution from taking place—assuming she in fact possessed the pills on her person. The lack of any immediate danger to students only further diminishes the initial minimal nature of the alleged infraction of bringing ibuprofen onto campus. As the Court pointed out in *T.L.O.*, a school is not a prison; the students are not inmates. *See* 469 U.S. at 338, 105 S.Ct. 733. We hasten to note, however, that if Savana had been accused

of a federal crime, she would have been entitled to more legal protections that she received here. *See* 18 U.S.C. § 5033 ("Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall . . . immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody."); *United States v. C.M.*, 485 F.3d 492, 499 n. 1 (9th Cir.2007) (noting that "the officer must also advise the parents that they are permitted to speak with their child before the child is interrogated").

As the Seventh Circuit reasoned in *Cornfield*, "a highly intrusive search in response to a minor infraction would . . . not comport with the sliding scale advocated by the Supreme Court in *T.L.O.*" 991 F.2d at 1320. Here, we have exactly such a scenario with the important additional variable that the subject of the search was a thirteen-year-old pubescent girl. Approving such a strip search would eviscerate the Supreme Court's stated goal of developing a standard that "ensure[s] that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *T.L.O.*, 469 U.S. at 343, 105 S.Ct. 733. We therefore conclude that the strip search was impermissible in scope. The Safford public school officials violated Savana's Fourth Amendment rights.

B. Was the Right of a Thirteen-Year-Old Girl to Be Free from Strip Searches on Suspicion of Possessing Ibuprofen Clearly Established in 2003?

Having determined that the strip search violated Savana's constitutional rights, we must consider whether those rights were clearly established at the time of the search. *Saucier*, 533 U.S. at 200, 121 S.Ct. 2151. That there is no case precisely on all fours does not preclude the conclusion that the Fourth Amendment right at issue was clearly established when the school officials stripped and searched Savana. *See Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1060-61 (9th Cir.2003) ("[I]t is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness was apparent in light of existing law."). We ask whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[13] *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151.

As of 1985, when the Supreme Court issued *T.L.O.*, the legal framework was clearly established that would put school officials on notice that a strip search was not a reasonable measure to use on a thirteen-year-old girl

13. There need not be judicial unanimity for us to conclude that a right was clearly established to a reasonable officer. Indeed, majorities on the Supreme Court and the various circuits have declared a right clearly established over the dissents of their colleagues. *See, e.g., Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223 (6th Cir.2005); *Johnson v. Hawe*, 388 F.3d 676 (9th Cir.2004).

accused by an unreliable student informant of having ibuprofen in violation of school rules. In *T.L.O.*, the Supreme Court carefully instructed school officials as to the twofold inquiry that must be made before they engage even in a minimally intrusive search: whether the search was justified at its inception and whether it was reasonable in scope in light of the nature of the infraction and the age and gender of the student. 469 U.S. at 341, 105 S.Ct. 733. The Safford authorities conducted their search almost twenty years after the Supreme Court's instructions issued in *T.L.O.* A reasonable school official, seeking to protect the students in his charge, does not subject a thirteen-year-old girl to a traumatic search to "protect" her from the danger of Advil. Indeed, the school officials' actions here were so patently in defiance of the considered approach *T.L.O.* dictates, that it is little wonder that we can find no case presenting identical facts.

Common sense and reason supplement the federal reporters. The *T.L.O.* Court expected no less of those to whom we entrust our children, leaving teachers to "regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343, 105 S.Ct. 733. Simply put: "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity." *Calabretta v. Floyd*, 189 F.3d 808, 819 (9th Cir.1999) (quoting *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir.1980)).

Earlier this year, the Sixth Circuit similarly recognized that some safeguards on government intrusion remain self-evident and do not require a case on point to prevent government officials from hiding behind the cloak of qualified immunity. In *Brannum v. Overton County School Board*, 516 F.3d 489 (6th Cir.2008), middle school students brought suit against the school district for installing and operating video surveillance equipment in the boys' and girls' locker rooms at their school. The court's stirring prose reminds us that "[s]ome personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to ensure their protection against government invasion. Surreptitiously videotaping [middle school students] in various states of undress is plainly among them." *Id.* at 499. Rejecting a claim of qualified immunity, the court concluded that "a person of ordinary common sense, to say nothing of professional school administrators, would know without need for special instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty." *Id.* Even without a specific case on point, "[t]hese notions of personal privacy are 'clearly established' in that they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches." *Id.*

We adopt the reasoning of the Sixth Circuit.[14] School children, as the Supreme Court recently reaffirmed, do not shed their constitutional rights at the schoolhouse gate. *Morse v. Frederick*, __U.S. __, 127 S.Ct. 2618, 2622, 168 L.Ed.2d 290 (2007) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)). This principle and the guidance provided by *T.L.O.* should have been clear to the school officials, who undertook the professional obligation to balance properly the order of the school with the individual liberties of the students who enter the school.

We hold that Savana's rights were clearly established at the time that Assistant Principal Wilson, in his official capacity, initiated and directed the strip search. The record before us leaves no doubt that it

---

14. We wish to note the basis for our reliance upon *Brannum*. This decision did not put Safford school officials on notice as to the unconstitutionality of the search, not only because *Brannum* deals with a suspicionless video search of a locker room, but also because the Sixth Circuit reached its decision five years after the search of Savana. Rather, we rely upon the sound reasoning of *Brannum* that is equally applicable to a factually distinguishable search, such as the one currently before us. Like the Sixth Circuit, we conclude that a reasonable school official did not need direction in the form of a factually indistinguishable case resolved by a federal court to understand disrobing a thirteen-year-old girl to search for ibuprofen violated the student's constitutional rights anymore than it needed a case to know it should not videotape a middle school locker room. The "dictates of reason and common sense," and the two-step inquiry of *T.L.O.* should have sufficed. *See T.L.O.*, 469 U.S. at 343, 105 S.Ct. 733.

would have been clear to a reasonable school official in Wilson's position that the strip search violated Savana's constitutional rights, and we therefore reverse summary judgment as to him and the school district. However, on the record before us, it is clear that the school nurse, Schwallier, and Wilson's assistant, Romero, acted solely pursuant to Wilson's instructions and not as independent decision-makers, and, thus, we affirm summary judgment as to them. *Cf. Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1028 (9th Cir.2002) (noting that for subordinate police officers involved in a search "so long as they ma[k]e inquiry into the nature and scope of [the] warrant, reliance on their leaders' representations about it is reasonable").

III. CONCLUSION

The strip search of thirteen-year-old Savana did not satisfy either prong of *T.L.O.* and therefore was conducted in violation of Savana's Fourth Amendment rights. These constitutional principles were clearly established by the United States Supreme Court twenty years before the Safford school officials conducted the strip search of thirteen-year-old Savana. Therefore, we reverse the district court's determination that there was no violation of Savana's constitutional rights, conclude that the constitutional principles were clearly established as to Assistant Principal Wilson, affirm the grant of qualified immunity as to Schwallier and Romero, and remand for further proceedings consistent herewith.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Appendix A

GOULD, Circuit Judge, with whom SILVERMAN, Circuit Judge, joins, dissenting:

Although I conclude that the Supreme Court's precedent in *New Jersey v. TLO*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), and common sense show that the strip search of Savanna was unreasonable and unconstitutional, I dissent from the court's judgment because I conclude, contrary to the majority in Part II-B of its opinion, that the defendants are entitled to a qualified immunity from liability. I also conclude that constitutional rights were impaired under *TLO* by a slightly different analytical framework than that advanced by the majority.

In my view, it is most sound to ask, in the language of the first prong of *TLO*, whether any search of Savanna was justified in its inception, and then to ask, in the language of the second prong of *TLO*, whether the search was reasonable in scope under the total circumstances when it progressed to an invasive strip search requiring Savanna to shed all of her clothes except for undergarments in front of the school nurse and employee Helen Romero, and to shake her bra and underpants before the officials' eyes. *See TLO*, 469 U.S. at 346-47, 105 S.Ct. 733 (considering each element of the search step-by-step).

I would hold that some search of Savanna was justified at the inception because of concerns about illicit distribution of drugs at the school and the tip that she had supplied Marissa with prescription strength

ibuprofen. To my thinking, to focus at the outset on the strip search poses the risk that we give inadequate heed to the real needs for some search of Savanna. I am confident that a reasonable school official should have proceeded to some search of Savanna in light of what Marissa had disclosed. Savanna does not contend otherwise; her complaint is only that the school officials went too far in requiring her to disrobe. Officials had been told by a person with an illicit drug that Savanna had supplied it, and that more distribution was to occur later that day involving others. This justified the school's request to search and its subsequent search of Savanna's pockets and backpack, and may have warranted other search or inquiry activities to interdict any further distribution of ibuprofen at levels beyond what could be bought without prescription.

However, it was unreasonable to proceed to a strip search. Nothing in Marissa's tip suggested, or would have led one to believe, that Savanna had likely hidden ibuprofen in her underwear. She was observed from the first moment she was confronted, and certainly from that point would not likely have been able to hide any illicit drugs in her underpants or bra. More important is the fact, apparently unrecognized by the school officials, that to force a teenage girl to strip upon school command would lead to an embarrassment of her that could cause deep and lasting psychological harm. Without more concrete and specific justification, the scope of the search conducted in the nurse's office was excessively intrusive and an affront to what most parents would consider common sense treatment of their

children at school. Thus I agree with my colleague Judge Wardlaw's conclusion that the strip search was unreasonable.

Finally, although I think our ruling should be crystal clear that schools may not subject a student to a strip search under circumstances as presented here, and although the general principles in *TLO* and other cases are well established, I can understand how school officials, even though they made an erroneous decision, should have some insulation from liability before our declaration of how these principles applied to this case. The fact that the district court and a majority of a prior panel of our court thought, and some dissenting judges on this panel continue to think, the scope of the search reasonable to me says something about a lack of clarity in our law. I am glad to agree with the majority opinion that the strip search was unreasonable in order to fix that. However, I conclude that the school officials are entitled to qualified immunity, and in this respect agree with the conclusion reached by my colleague Judge Hawkins in Section III of his opinion. In my view, qualified immunity is available because the law heretofore did not give adequate guidance to the school officials.

Appendix A

HAWKINS, Circuit Judge, joined by Chief Judge KOZINSKI and Judge BEA, dissenting:

In this case we confront a formidable Fourth Amendment task: weighing the privacy interests of a thirteen-year-old girl against the interest of school officials in maintaining a safe and orderly school environment, which was threatened by, among other things, the discovery of unapproved prescription-strength ibuprofen on school grounds and the recent memory of a prescription-drug incident in which a student nearly died. The majority's Opinion holds that the officials' search[1] was unreasonable—both because it was unjustified at its inception and unreasonable in scope—and that the right to be free from such a search was clearly established at that time. I respectfully disagree on both issues.

In *New Jersey v. T.L.O.*, the Supreme Court held that a "reasonableness" standard governs school official searches, "spar[ing] teachers and school administrators the necessity of schooling themselves in the niceties of

1. The majority favors the term "strip search" to describe a search that took place in a closed office with only a female school nurse and female administrator present, and began with Redding removing her jacket, shoes, socks, pants and shirt, and continued with her pulling her bra and shaking it, partially exposing her breasts, and pulling her underwear away from her body and shaking it, partially exposing her pelvic area. I would reserve the term "strip search" for a search that required its subject to fully disrobe in view of officials, and I think it is useful to maintain the distinction so that we can distinguish such searches from the one in this case.

probable cause and permit[ting] them to regulate their conduct according to the dictates of reason and common sense." 469 U.S. 325, 343, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). Given that sound minds often differ on the dictates of reason, my disagreement with the majority likely boils down to the weight to be assigned to the parties' respective interests and the degree of imbalance required to find a constitutional violation.

That said, I do have specific points of disagreement. In contrast to the Supreme Court's recent school search cases, the majority fails to acknowledge the unique considerations present in the public school setting, including the need for informal and flexible disciplinary measures, and the considerable risk presented by drugs. The Opinion also yields two rules that sweep too broadly: (1) that an uncorroborated tip from a student facing punishment is insufficient to justify the search at issue; and (2) that the search was per se unreasonable because officials were only seeking prescription-strength ibuprofen.

Finally, even if one were to accept the majority analysis, it appears abundantly clear that a reasonable school official did not, indeed could not, have had fair notice that the search violated Savana Redding's rights. *See Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

For these and the following reasons, I respectfully dissent.

Appendix A

I. The Flexibility of Cause in the School Setting

In *T.L.O.*, the Court recognized that an exceptional rule was required for a singular context and held that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." 469 U.S. at 340, 105 S.Ct. 733. The majority accurately recites the reasonableness inquiry, but fails in my view to acknowledge the impetus behind the novel standard: the need for school officials to act flexibly and swiftly in their efforts to maintain orderly and safe educational environments. Because this concern ought to guide a student search analysis, a review of the *T.L.O.* Court's reasoning will enhance the ultimate inquiry.

In crafting a reasonableness standard for student searches, the *T.L.O.* Court did not simply extend the extant Fourth Amendment jurisprudence governing law enforcement searches. Instead, it recognized that "what is reasonable depends on the context within which a search takes place," which requires " 'balancing the need to search against the invasion which the search entails.' " *T.L.O.*, 469 U.S. at 337, 105 S.Ct. 733 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967)).

The Court rejected the argument that children lack any legitimate expectations of privacy on campus, *T.L.O.*, 469 U.S. at 338-39, 105 S.Ct. 733, but explained that "[a]gainst the child's interest in privacy must be set the substantial interest of teachers and administrators in

maintaining discipline in the classroom and on school grounds," *id.* at 339, 105 S.Ct. 733. Although the Court took note of the recent rise in drug use and violent crime, it made clear that "[e]ven in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *Id.*

Of course, the preservation of order is an important goal outside of schools, but the school environment presents unique challenges. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action," and, therefore, "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures." *Id.* at 339-40, 105 S.Ct. 733 (internal quotation marks omitted). Accordingly, the Court set out to craft a standard that would "preserv[e] the informality of the student-teacher relationship." *Id.*

Based on this reasoning, *T.L.O.* held that the general Fourth Amendment warrant requirement is ill-suited for school searches, for it would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." 469 U.S. at 340, 105 S.Ct. 733. The Court did not stop there, however. Over a spirited dissent, *id.* at 353-70, 105 S.Ct. 733 (Brennan, J., dissenting), the Court concluded that "the accommodation of the privacy interests of school children

with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause," *id.* at 341, 105 S.Ct. 733 (majority opinion). The Court believed that "the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.* at 343, 105 S.Ct. 733.

The newly-minted reasonableness standard was to govern all school searches, even those that resulted from students' infractions of seemingly trivial rules.

> We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules. The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. . . . Absent any suggestion that the [rule forbidding specified conduct] violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

Id. at 342 n.9, 105 S.Ct. 733.

Appendix A

This review of the Court's thinking should inform our understanding of the reasonableness standard. The normal Fourth Amendment balancing has been tipped to be more favorable to school officials; children maintain their right to a legitimate expectation of privacy, but school officials do not need probable cause to invade that right. This recalibration of the Fourth Amendment scales has a purpose: allowing school officials to respond swiftly and informally to effect their "substantial interest" in maintaining order in schools, including schools with no significant history of disciplinary problems. Further, the standard implicitly recognizes that school officials deserve deference to their policy judgments, as courts are expressly forbidden from deciding which school rules are too trivial to trigger searches under the reasonableness standard.

In light of this, it is important that our school search decisions have a forward-looking element. We must keep an eye on the consequences of our rulings so that we do not inadvertently formalize a setting that the Supreme Court has insisted remain informal. Similarly, we must manage the ever-present risk of impeding school officials' ability to respond quickly to disciplinary infractions, even if we think such infractions relatively benign. "A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker." *T.L.O.*, 469 U.S. at 353, 105 S.Ct. 733 (Blackmun, J., concurring in the judgment).

This is not to say that we must rubber stamp every school search. While "unblinking deference," Majority at 1079-80, is certainly not called for, we should recognize that our normal, healthy skepticism of government authority must be reconciled with the realities of the school environment. "[T]eachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child." *T.L.O.*, 469 U.S. at 348, 105 S.Ct. 733 (Powell, J., joined by O'Connor, J., concurring). Whereas "[l]aw enforcement officers function as adversaries of criminal suspects," "[r]arely does this type of adversarial relationship exist between school authorities and pupils. . . . The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education." *Id.* at 349-50, 105 S.Ct. 733.

T.L.O.'s emphasis on these aspects of the school environment has been reaffirmed in subsequent cases. In *Vernonia School District 47J v. Acton*, the Court rejected a Fourth Amendment challenge to a school district's policy of conducting random urinalysis drug testing on student athletes, which required those students to urinate under teacher supervision. 515 U.S. 646, 648, 650, 664-65, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). In doing so, it noted that *T.L.O.* emphasized that "the State's power over school-children" is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Id.* at 655, 115 S.Ct. 2386. In *Acton*, the school's role as

a "guardian and tutor" was the "most significant element" in the Court's decision. *Id.* at 665, 115 S.Ct. 2386.

Considering the government's interest in "[d]eterring drug use by our Nation's school children," the Court opined that "the nature of the concern is important—indeed, perhaps compelling—[which] can hardly be doubted." *Id.* at 661, 115 S.Ct. 2386. Students are the most susceptible to the physical, psychological, and addictive effects of drugs, *id.*, and "of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted," *id.* at 662, 115 S.Ct. 2386.

Acknowledging that there was a less intrusive means of deterring drug abuse— " 'drug testing on suspicion of drug use' "—*Acton* reiterated that there is no "least intrusive" requirement under the Fourth Amendment. *Id.* at 663, 115 S.Ct. 2386. The suspicion-of-drug-use requirement was undesirable because it would "add[ ] to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation." *Id.* at 664, 115 S.Ct. 2386.

More recently, the Supreme Court upheld a similar urinalysis drug testing policy that applied not only to student athletes, but also to all students who participated in competitive extracurricular activities.

Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 825, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). The Court explained that "[a] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety," and cited as examples policies that require students to routinely "submit to physical examinations and vaccinations against disease." *Id.* at 830-31, 122 S.Ct. 2559.

Reiterating the problems of adolescent drug abuse in schools discussed in *Acton*, the *Earls* Court stated that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Id.* at 834, 122 S.Ct. 2559; *see also id.* at 835, 122 S.Ct. 2559 ("[T]his Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing."). And, once again, the Court rejected the argument that the Constitution requires individualized suspicion before testing. *Id.* at 837, 122 S.Ct. 2559. In addition to the reasons discussed in *Acton*, the Court offered an additional concern: "The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use." *Id.*

Finally, just one year ago, the Supreme Court held that schools can "restrict student expression that they reasonably regard as promoting illegal drug use." *Morse v. Frederick*, __ U.S. __, 127 S.Ct. 2618, 2629, 168 L.Ed.2d 290 (2007). Drawing on the three Fourth

Amendment school search cases, it restated that " 'the nature of [school children's] rights is what is appropriate for children in school,' " and that "deterring drug use by school children is an 'important—indeed, perhaps compelling' interest." *Id.* at 2627, 2628 (quoting *Acton*, 515 U.S. at 656, 661, 115 S.Ct. 2386).

Twenty-three years after it was decided, *T.L.O.* remains good law. Students still have reduced expectations of privacy on campus, and school officials are still entitled to promptly and informally confront threats to school order. Not only has the Court failed to strike down any searches under *T.L.O.*, it has gone even further, holding that schools can require students to provide urine samples under teacher supervision without any suspicion of drug use, and without any history of drug problems at the school. It is against this background that we must evaluate this search.

II. The Constitutionality of the Search

A. Inception

For a *T.L.O.* search[2] to be reasonable, it must be justified at its inception and reasonable in its scope. *T.L.O.*, 469 U.S. at 341, 105 S.Ct. 733. Generally, such a search will be " 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 342, 105 S.Ct. 733.

Following the lead of the Second and Seventh Circuits, the majority holds that the level of suspicion required for a search to be justified at its inception

---

2. Hereafter, this dissent refers to a public school official's search of a student that is based on individualized suspicion as a " *T.L.O.* search." Such a search can be distinguished from an " *Acton* search" in which school officials conduct a systematic search without any individualized suspicion, and for which courts (should) use a different balancing test. *See Acton*, 515 U.S. at 653, 115 S.Ct. 2386 (distinguishing *T.L.O.* because the search approved in that case, "while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing"); *see also Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1166-68 (11th Cir.2001) (explaining the distinction between the two types of searches), *vacated*, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 829 (2002), *reinstated*, 323 F.3d 950, 952 (11th Cir.2003). *But see Brannum v. Overton County Sch. Bd.*, 516 F.3d 489, 495 (6th Cir.2008) (conflating the two types of searches and applying the *T.L.O.* two-step test to evaluate suspicionless use of video surveillance in school locker rooms).

varies with the intrusiveness of the search. Majority at 1080-82 (citing *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir.2006); *Cornfield ex rel. Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir.1993)). This holding finds no support in the text or reasoning of *T.L.O.*, and it is by no means certain that the Supreme Court would approve.[3] *Cf.* 5 Wayne R. Lafave, Search

---

3. It may be simpler to analyze the intrusiveness of the search under the "scope" prong of the *T.L.O.* inquiry. This would allow the two *T.L.O.* prongs to be meaningfully distinct. The "justified at its inception" prong would inquire whether, based on all the circumstances, officials have a reasonable suspicion "that *the particular individual* being [searched] is engaged in wrongdoing." *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) (emphasis added); *see also* Gould Dissent at 1090. The "reasonable in scope" prong, by contrast, would focus on the nature and intrusiveness of the search, including the locations (such as underwear) that officials searched for evidence. *See United States v. Sharpe*, 470 U.S. 675, 682-83, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985) (holding that law enforcement officers' decision to pull over specific vehicles on suspicion of drug trafficking was clearly justified at its inception based on those vehicles' characteristics and driving patterns; analyzing whether investigative stop was "too long in duration" under the reasonably-related-in-scope prong).

For example, a tip that "Redding is hiding stolen cash" would justify at its inception a decision to conduct some form of search of Redding because it created a reasonable suspicion that she, as opposed to someone else, was engaging in prohibited conduct. That tip alone, however, might be insufficient to permit a particularly intrusive search. By contrast, a tip that "some student hid stolen cash in her bra" would not justify at its

(Cont'd)

and Seizure § 10.11, at 501 (4th ed.2004) (noting with regret that "the reasonable suspicion test of[*T.L.O.*] is nowhere confined to searches of only limited intrusiveness").

I see the searches in *T.L.O.* somewhat differently than the majority. That case did not define those two searches by their level of intrusiveness; the searches were discrete because objects from unrelated infractions were sought. Had the Court employed the majority's standard, it might have said that the case involved a first search—opening and peering into the purse—providing suspicion that gave rise to the second search—rummaging through the purse. Instead, the Court explained that the case "involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marihuana." *T.L.O.*, 469 U.S. at 343-44, 105 S.Ct. 733.

Looking at the facts of *T.L.O.*, it is not difficult to determine why the Court identified the two searches in this way. When T.L.O. was first presented to the assistant vice principal, she was suspected only of violating the school's cigarette smoking policy. *T.L.O.*, 469 U.S. at 328, 105 S.Ct. 733. Once those cigarettes were found, it would have been unreasonable to continue searching T.L.O.'s

(Cont'd)

inception a search of Redding because it gave no indication that *she* was hiding cash in her bra. Once officials gathered additional information that indicated Redding was the one with the cash, then a search of the bra would likely be reasonable in scope because of the specific information in the tip.

purse for evidence of other wrongdoing, absent some newly discovered grounds for suspicion. This would be true even if the further search was *less* intrusive.[4] It was therefore sensible to identify the initial search for cigarettes as a single, limited search. Because rolling papers were found during the cigarette search, though, the assistant vice principal had reasonable suspicion justifying a second search—whether more or less intrusive.

Further, nothing in *T.L.O.* suggests that the assistant vice principal would not have been able to rummage through T.L.O.'s purse looking for cigarettes if they had not happened to be in sight when the purse was opened. Indeed, it is difficult to understand how the search for marijuana in the main compartment of the purse was meaningfully more intrusive than the search for cigarettes.[5]

---

4. *See infra* note 17 and accompanying text.

5. When, in the midst of looking for evidence of marijuana trafficking, the assistant vice principal read some letters he found in T.L.O.'s purse, he arguably conducted a more intrusive search than when he merely opened and looked into the purse for cigarettes. The Court's opinion indicates, though, that it was the further search of the purse-and not the reading of the letters—that marked the beginning of the second search. *See T.L.O.*, 469 U.S. at 347, 105 S.Ct. 733 ("The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.'s purse. . . .").

A final point on *T.L.O.*: If the majority is correct, then the Supreme Court erroneously stated that there were only two searches. After all, if opening and looking into a purse is one search, and looking further into the purse is a second, then surely the search of a separate zippered purse compartment would have been a third, and the reading of letters discovered therein would have a been a fourth. *See T.L.O.*, 469 U.S. at 347, 105 S.Ct. 733.

Although the Supreme Court expressly considered the argument that the school official unreasonably read those letters, it did not identify that act, which was the most intrusive, as a separate search.[6] *Id.* And we can fairly assume the reason it did not: Imagine how burdensome it would be for courts to conduct the two-step *T.L.O.* inquiry for every component of a search. If the majority faithfully applied its own standard, it would have separately analyzed each increasingly intrusive step in today's search—(1) opening Redding's backpack and peering inside, (2) subsequently rummaging in the backpack, (3) removing Redding's

---

6. The Court did consider, though, whether "the scope of the search [for marijuana] . . . exceeded permissible bounds when[the official] seized and read" the letters. *T.L.O.*, 469 U.S. at 347, 105 S.Ct. 733. The Court held that all the other evidence of marijuana trafficking found in the purse "was substantial enough to justify [the official] in examining the letters." *Id.* By framing the issue as the "scope of the search," it seems fairly clear that the Court was deciding whether the search for marijuana was "permissible in its scope," and not whether the reading of the letters was "justified at its inception."

shoes and peering inside, (4) reaching into the shoes, and so on with respect to Redding's socks, pants, and shirt. So much for "spari[ing] teachers and school administrators the necessity of schooling themselves in the niceties of probable cause." *Id.* at 343, 105 S.Ct. 733. School officials may find themselves having to contend with a "reasonable suspicion" doctrine that is becoming more complex than the probable cause doctrine rejected by *T.L.O.*

All that said, because the search appears justified at its inception even under the majority's standard, this dissent will assume that the majority is correct and that a heightened level of suspicion was required to justify this particular search of Redding.

Even under the majority's sliding scale approach, though, school officials would be able to proceed with searches on something less than probable cause, even for highly intrusive searches.[7] Reasonable suspicion has

7. The majority's sliding scale approach is much like Justice Stevens' preferred school search standard. In his *T.L.O.* dissent, Justice Stevens argued that school searches should only be permitted when there is reasonable suspicion that those searches would "uncover evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process." *T.L.O.*, 469 U.S. at 378, 105 S.Ct. 733 (Stevens, J., dissenting) (emphasis omitted). Whereas today's majority looks to the degree of the search's intrusiveness to determine how much suspicion is required, Justice Stevens would have "varie[d] the extent of the permissible intrusion with the gravity of the suspected offense."

(Cont'd)

been defined as "a particularized and objective basis for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (internal quotation marks and citations omitted).

Because these are "fluid concepts," and not "finely-tuned standards" that are "readily, or even usefully, reduced to a neat set of legal rules," *Ornelas*, 517 U.S.

(Cont'd)

Id. at 379, 105 S.Ct. 733. Both standards would, in their own way, prohibit searches that " 'display[ ] a shocking lack of all sense of proportion.' " *Id.* at 380, 105 S.Ct. 733 (quoting *McDonald v. United States*, 335 U.S. 451, 459, 69 S.Ct. 191, 93 L.Ed. 153 (1948) (Jackson, J., concurring)).

The *T.L.O.* majority explicitly rejected Justice Stevens' standard because it would intrude too much upon school officials' "comprehensive authority . . . to prescribe and control conduct in the schools." 469 U.S. at 342 n. 9, 105 S.Ct. 733 (internal quotation marks omitted). The Court's insistence on a reasonable suspicion standard for searches that follow the most trivial infractions does not necessarily mean that the Court would reject a probable cause standard for the most intrusive searches. But I do think that our adoption of a probable cause standard for highly intrusive searches would violate the tenor of *T.L.O.* and create significant tension with that authority, and we should, therefore, prudently abjure such a rule absent a contrary indication from the Supreme Court.

at 695-96, 116 S.Ct. 1657 (internal quotation marks omitted), attempting to distinguish between a high level of reasonable suspicion and probable cause may be something of a fool's errand. Nevertheless, we must not demand that school officials present too much independently corroborated evidence from unquestionably reliable sources; we must ensure that even highly intrusive searches do not stand or fall on the presence of probable cause.[8]

Under the reasonable suspicion standard, our goal is to ensure that Kerry Wilson, Helen Romero, and Peggy Schwallier (collectively, the Safford Officials) were not acting on the basis of "an inchoate and unparticularized suspicion or hunch," but rather on "the sort of common-sense conclusio[n] about human behavior upon which practical people—including government officials—are entitled to rely." *T.L.O.*, 469 U.S. at 346, 105 S.Ct. 733 (internal quotation marks omitted; alteration in original).

Based on the record evidence, the Safford Officials possessed sufficient information to reasonably suspect Redding of possessing prescription-strength ibuprofen.

---

8. *See T.L.O.*, 469 U.S. at 353, 105 S.Ct. 733 (Blackmun, J., concurring in the judgment) (explaining that school officials' ability to respond swiftly would not "be possible if a teacher could not conduct a necessary search until the teacher thought there was probable cause for the search. A teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause").

Although Redding had no disciplinary record, there was reason to suspect that she had violated Arizona's law regarding possession and consumption of spiritous liquor by a person under the legal drinking age just a few months before the October search. *See* Ariz.Rev.Stat. Ann. § 4-101(18) (" 'Legal drinking age' means twenty-one years of age or older."); *id.* § 4-244(9) (providing that it is unlawful "for a person under the legal drinking age to buy, receive, have in the person's possession or consume spiritous liquor").

At the August school dance, "several staff members noticed some unusually rowdy behavior from a small group of students, including Marissa . . . and Savana Redding," and a bottle of alcohol and a pack of cigarettes were found in the girls' bathroom. The majority points out that the staff found no specific link between Redding and the bottle, Majority at 1075, but there is undisputed testimony that the staff detected the smell of alcohol among Redding's small group.

A week before Redding's search, Principal Robert Beeman and Assistant Principal Wilson sat down to meet with Jordan and his mother at her request. Jordan's mother reported that he had become violent with her and sick to his stomach a few nights earlier, and Jordan explained that this occurred after he ingested some pills that he received from a classmate. He also advised the administrators that students were bringing weapons and drugs onto school grounds.

As the meeting progressed, Jordan provided Beeman (Wilson had left the meeting) with "very detailed accounts regarding several students' activities," including Marissa and Redding. Jordan reported that Redding had hosted a party in her camper trailer before the August dance, and that she had served alcohol—"Jack Daniel's, Black Velvet, vodka, and tequila"—that her mother had purchased. After the meeting, Beeman relayed the information to Wilson.

We can pause at this point and review the evidentiary picture from the perspective of a reasonable school official. The eighth graders' school year began inauspiciously when staff noticed signs of illegal alcohol consumption at the school dance. With Jordan's report, the situation was ripening into something much more dangerous—the presence of drugs and weapons on campus. The description of Jordan's reaction to his pill ingestion would have recalled to a reasonable school official's mind an incident several years before in which a Safford Middle School student brought prescription pills to school and distributed them. In that incident, a student who took that drug had to be airlifted to an intensive care unit and almost died.

While Redding's role in all this was somewhat unclear at this point, certainly Jordan's account of the pre-dance party, coupled with the staff's report from that dance, supported a reasonable suspicion that Redding had been illegally serving and consuming alcohol less than a month and a half earlier. Further, the staff's report suggested that Redding and Marissa

were, to some extent, partners in this mischief.[9] Although we accept as true Redding's testimony that she did not serve or consume alcohol that night and that Jordan did not attend her party, there is no evidence that this was ever communicated to any official at Safford Middle School. To justify a reasonable suspicion, the officers' factual determinations were not required to be correct, but only reasonable given the facts known to them. *See Phaneuf v. Fraikin*, 448 F.3d 591, 597 (2d Cir.2006); *United States v. Hartz*, 458 F.3d 1011, 1017-18 (9th Cir.2006); *United States v. Hatley*, 15 F.3d 856, 859 (9th Cir.1994).

One week after the meeting with Jordan and his mother, Wilson was confronted with hard evidence that drugs were indeed on campus. On the morning of October 8, Jordan went to see Wilson and handed him a pill that he had just received from Marissa. According to Jordan, there were additional pills in the school that some students were planning on taking at lunch.[10] Wilson

9. When Beeman followed up with Redding's mother, she "simply dismissed the account by saying that Savana would not have been involved." The majority seems to give full credit to this statement. Majority at 1083-84. Based on Beeman's affidavit, one can infer that Redding's mother lacked personal knowledge of the party, given that she said that Redding "would not have been involved," instead of "was not involved." In light of this, one might question whether her denial should have carried much weight with the school officials in light of the mutually reinforcing observations of disinterested witnesses.

10. The majority points out that "the information provided by Jordan link[ed] Marissa alone to the ibuprofen." Majority at

(Cont'd)

consulted with Schwallier, the school nurse, who told him that the pill was Ibuprofen 400 mg, which could be obtained only with a prescription.

Wilson called Marissa out of class and asked her to accompany him. As Marissa stood up, Wilson noticed a planner in the desk next to her and asked the classroom teacher to determine its owner. The teacher discovered several knives and lighters, a cigarette, and a permanent marker inside the planner, and shared this information with Wilson.

Arriving at his office with Marissa and the planner, Wilson asked Romero, an administrative assistant, to observe as Marissa turned out her pockets and opened her wallet. Marissa complied, producing a blue pill (later discovered to be Naprosyn 200 mg), several pills identical to the one Jordan had possessed, and a razor blade.

According to Wilson's affidavit, the following exchange took place: "[Wilson] asked Marissa where the blue pill came from. Marissa responded, 'I guess it slipped in when *she* gave me the IBU 400s.' [Wilson] asked 'who is *she?*' Marissa responded 'Savana Redding.' "

(Cont'd)

1083. This is correct in that Jordan only specifically identified Marissa. To be clear, though, Jordan told Wilson that other students were planning on taking pills, so Wilson could have reasonably believed that students other than Marissa were in possession of pills.

Wilson asked Marissa about the planner, and she denied any knowledge of it and its contents. A subsequent search of Marissa conducted by Nurse Schwallier and Romero failed to produce any more pills.

At this point, one can conclude that Wilson had sufficient evidence to support a reasonable suspicion that Redding had prescription-strength ibuprofen, Naprosyn, and possibly other drugs.[11] Marissa expressly identified Redding as the supplier, and there was nothing to suggest that this was not true.

The majority views Marissa's statement with extraordinary skepticism. We are told that Marissa, a "frightened" girl, Majority at 1083, was "attempt [ing] to shift the school officials' focus off herself," Majority at 1077, with a "self-serving," "self-exculpatory" explanation, Majority at 1083.

Wilson's affidavit is the only discussion in the record of Marissa's behavior during the meeting.[12] Notably

---

11. Based on Marissa's statement, one could reasonably speculate whether Redding possessed pills other than Naprosyn and ibuprofen. This is because Marissa suggested that Redding had only intended to give her ibuprofen, and that the Naprosyn had inadvertently "slipped in." If Redding had possessed Naprosyn without intending to share it that morning with Marissa, it was an open question what other pills she may have had that were withheld from Marissa.

12. Romero's affidavit also discusses Marissa's statement, but it is identical to the language in Wilson's affidavit.

absent from that discussion is any indication that Marissa was frightened. And the statement can hardly be characterized as exculpatory because it in no way reduced Marissa's guilt; regardless of whether she brought the pills from home or received them from Redding, Marissa was caught with them in her possession and was known to have distributed one to Jordan.

The only way the statement would be self-serving is if it somehow furthered Marissa's interests. There is no evidence that she had any ulterior motive for implicating Redding, or that she would face a reduced punishment for cooperating. If, for example, Marissa was facing a suspension for possession and distribution of the pills, there is no reason to believe that she would have escaped that punishment simply by naming her source. And even if Marissa did think she was helping herself out by blaming Redding, nothing put Wilson on notice that Marissa held such a belief.

Further, even if we should assume that Marissa would have believed that there would be a quid pro quo for naming her source, it is difficult to see why Wilson should have suspected Marissa was lying. If Marissa knew that Redding actually had no pills, she also would have known that a search would have turned up nothing. A fruitless search that wasted Wilson's time may have temporarily shifted the focus off of Marissa, but Marissa should not have thought that it would abate her inevitable punishment.

Of course, the situation could be different if there were evidence that Marissa had been induced or intimidated into naming Redding. Had Wilson pressured Marissa into supplying other students' names, one might wonder whether she had been making up a story simply to please him. Similarly, had Wilson suggested to Marissa that he suspected Redding—for example, "Honestly, Marissa, it was Savana who gave you the pills, wasn't it?"—one might think Marissa was simply telling Wilson what he wanted to hear. According to the undisputed testimony, however, none of these circumstances were present.

In spite of all the objections that the majority raises to Wilson's reasoning, his suspicion of Redding simply does not appear to be "the product of a volatile or inventive imagination," or a pretext for "an act of harassment." *Terry v. Ohio*, 392 U.S. 1, 28, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Because it was reasonable to conclude that Redding brought pills to school that morning, "it is irrelevant that other hypotheses"—including the hypothesis that Marissa was lying—"were also consistent with [Marissa's] accusation." *T.L.O.*, 469 U.S. at 346, 105 S.Ct. 733.

Returning to the events, Wilson's immediate response to Marissa's tip was sensible. He told Redding to leave her classroom and to bring her books and backpack with her. They returned to his office, where Wilson asked Redding whether she knew anything about the planner and the pills sitting on his desk.

Redding admitted that the planner was hers and informed Wilson that she had lent the planner to Marissa a few days earlier. Like Marissa, however, she denied ownership of any of its contents. She also stated that she had never brought any prescription pills to school and that she had never distributed pills to other Safford students.

Wilson asked Redding if he could search her "stuff," and Redding consented. Romero was called in to assist, and a search of Redding's backpack turned up nothing.

Wilson now had to decide whether a further search of Redding was called for. Nothing in his exchange with Redding cast doubt on Marissa's story. Nor did Redding offer any reason why another student would falsely accuse her. The meeting, in other words, failed to produce any information that should have removed Wilson's reasonable suspicion.

Indeed, information uncovered at the meeting actually *increased* the likelihood that Redding had supplied Marissa with the pills. By conceding that she had lent Marissa the planner, Redding established a crucial link between the two girls, enabling Wilson to reasonably conclude that Redding and Marissa were friends.

The majority rejects this reasoning, asserting that Redding's lending of the planner "does not make it significantly more likely that Savana had anything to do with the pills carried in Marissa's pockets." Majority

at 1084. This is the "crabbed notion of reasonableness" that the *T.L.O.* Court rejected. *T.L.O.*, 469 U.S. at 343, 105 S.Ct. 733.

> [I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Id. at 345, 105 S.Ct. 733 (quoting Fed.R.Evid. 401).

To be sure, the planner was only circumstantial evidence of Redding's pill distribution, for it did no more than establish that there was a relationship between Marissa and Redding. Wilson had reason to believe Marissa and Redding were friends from the reports of their behavior at the school dance, and the planner corroborated that. Although the planner was not direct evidence of pill possession, common sense suggests that it is significantly more likely an eighth grader will receive contraband from a classmate who has lent her personal items than from someone with whom she has hardly any relationship at all. This does not suggest that the planner independently justified the search, and it is certainly not "guilt-by-association." Majority at 1084. If anything, it is "guilt" (or, more accurately, suspicion) by direct accusation and circumstantial corroboration.

Redding's denial itself deserves little weight.[13] Everything the majority says to impugn Marissa applies with greater force to Redding, since her statement was truly exculpatory and wholly self-serving. *See, e.g.*, Majority at 1082-83 (viewing skeptically "the self-serving statement of a cornered teenager facing significant punishment").

The majority would credit Redding over Marissa in this "she said, she said" contest because Marissa's "compounding number of school rule violations"—the objects concealed in the planner-should have left Wilson incredulous. Majority at 1084. Wilson, however, did not know that those objects belonged to Marissa, and not Redding. While both girls denied knowledge of the planner's contents, Redding admitted to owning the planner. Although it would be perfectly reasonable for Wilson to surmise that Marissa placed the contraband in the planner without Redding's knowledge, he could not be sure that Redding had not given Marissa the planner with those items in it.

Redding's discipline-free record is of limited probative value in light of the strong signs that she had recently been drinking liquor and serving it to her classmates. And, unless we think that the Fourth Amendment gives greater protection to good test takers, there is only so much weight we can give to Redding's honor-student status.

---

13. Obviously, a confession by Redding would have conclusively established reasonable suspicion, so the absence of a confession is in that sense meaningful.

We are told that "Wilson should have conducted additional investigation to corroborate Marissa's 'tip' " before ordering an intrusive search—he could have had a discussion with Redding's teachers, her parents, and other students. Majority at 1083. Although these options may be desirable in other contexts, they disregard the special needs of the school environment that were articulated in *T.L.O.*

Pulling teachers and students out of class to question them about Redding's behavior would be extraordinarily disruptive to the educational environment. *See T.L.O.*, 469 U.S. at 353, 105 S.Ct. 733 (Blackmun, J., concurring in the judgment) ("The time required for a teacher to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education."). If Wilson had information that suggested specific students or teachers had knowledge relating to Marissa and Redding, then it may have been prudent to question those individuals. But without any specific leads, it would seem incredibly burdensome to require that Wilson conduct a full-scale investigation, speaking to every student and teacher, simply to corroborate Marissa's tip.[14] *Cf. Earls*, 536 U.S.

---

14. Discussions with Redding's parents certainly would have shown a level of respect for them and Redding, and their presence would have likely alleviated some of the stress and anxiety that Redding may have been feeling. For those reasons, we can encourage school officials to show compassion by

(Cont'd)

at 837, 122 S.Ct. 2559 (noting that a regime of individualized suspicion "place[s] an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline").

Moreover, these hypothetical investigations appear designed to amass enough evidence to supply Wilson with probable cause. If Wilson had lacked a specific tip from Marissa, then it would have been necessary for him to marshal a good deal of circumstantial evidence to justify the search of Redding. As it stands, though, it is hard to imagine what sort of additional evidence Wilson could have received that would supply him with a level of reasonable suspicion that was less than probable cause.

Both the majority and this dissent discuss at length whether this search was justified at its inception. It is certainly a scenario about which entirely reasonable minds can differ. In scrutinizing this particular search,

---

(Cont'd)

involving parents in the searching and questioning of students. As a means of furthering the Redding investigation, though, discussions with Redding's parents would have likely provided little useful information. Had Redding admitted to having the pills, but insisted that she had a legitimate reason for bringing them on campus (and handing them to Marissa), her parents may have been able to corroborate her story. But Redding insisted that she brought no pills to school, and unless her parents had searched her and her belongings that morning, it is difficult to envision what information they could offer to negate Wilson's reasonable suspicion.

though, we should not lose sight of an important point: Today's justified-at-its-inception holding is not limited to searches for ibuprofen. Had Marissa been caught with uncut cocaine or bullets for a small-caliber handgun, the analysis would necessarily be the same. Although the "nature of the infraction" is relevant to the overall reasonableness inquiry, *T.L.O.* makes clear that the infraction is relevant only to the "scope" analysis; it has no bearing on the quantum of suspicion necessary to justify a search. *T.L.O.*, 469 U.S. at 341-42 & n. 9, 105 S.Ct. 733. And, in today's educational environment, students do bring guns and drugs into their classrooms.

B. Scope

A search that is justified at its inception will nevertheless be unreasonable if it is not "reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 U.S. at 341, 105 S.Ct. 733. A search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, 469 U.S. at 342, 105 S.Ct. 733.

We have reached the heart of this case. Having considered Redding's age, the relative harmlessness of ibuprofen, the trauma of this search, and the lack of particularized suspicion that pills would be found in Redding's underwear, the majority determines that the school officials "adopted a disproportionately extreme measure" that was impermissible in scope. Majority at 1084-86.

The majority lays out an eminently reasonable argument to support this conclusion. Nevertheless, because I weigh the factors differently and accord the school officials' judgment greater deference, I would find the search reasonable in scope.

Given that the precise contours of this "scope" analysis are undefined,[15] school officials and lower courts could greatly benefit from the development of clear guidelines. The following three-step inquiry and some general rules might be helpful in that regard.

First, courts should determine whether "the measures adopted are reasonably related to the objectives of the search." *T.L.O.*, 469 U.S. at 342, 105 S.Ct. 733. This straightforward inquiry considers the search's probability of success, examining the nature of the evidence sought and any facts that make it more or less likely such evidence will be found in a specific location.[16]

For example, if a student were rumored to have brought a baseball bat on campus in violation of school policy, a search of that student's shirt pocket would be patently unjustified. Or if a student reports that she just saw drugs in a classmate's locker, and the classmate

---

15. *See supra* note 3; *infra* Part III.

16. Where, as the majority does here, a court considers whether a specific *type* of search is justified at its inception (e.g., visual body search, purse search), this analysis is probably redundant.

has had no opportunity to remove those drugs, a search of any place other than the locker may be unreasonable. The same can be said if a specific item is sought—say, a stolen necklace—and a search of the suspect's shoes uncovers the necklace; it would probably be unreasonable to continue searching the suspect or his belongings for additional contraband.[17]

The next two steps of the "scope" inquiry consider whether a search that has some probability of success is unreasonable because it is "excessively intrusive." *T.L.O.*, 469 U.S. at 342, 105 S.Ct. 733.

In the second step, we examine the characteristics of the search. Our goal is to measure its intrusiveness in light of the attributes of the suspected student.

T.L.O. provides two specific attributes to consider: age and sex. *T.L.O.*, 469 U.S. at 342, 105 S.Ct. 733. In *Acton*, the Court went further and approved random urinalysis of student athletes because, in part, "[s]chool sports are not for the bashful" and "there is an element of communal undress inherent in athletic participation." *Acton*, 515 U.S. at 657, 115 S.Ct. 2386 (internal quotation marks omitted). There is no reason to limit the factors to age, sex, and extracurricular activities.

---

17. Alternatively, one might say that a continued search is no longer justified at its inception unless additional evidence of some separate infraction were found in the midst of the initial search. *See T.L.O.*, 469 U.S. at 347, 105 S.Ct. 733; *see supra* note 4 and accompanying text.

Mental disability, for instance, is relevant to determining whether a child can give effective consent. It may be more unreasonable to pat down or strip search a child who had been physically or sexually abused than a child without such history. And if school officials know that a student has a particularly acrimonious or emotionally fraught relationship with a specific teacher, "reasonableness" may counsel that the teacher be prohibited from conducting intrusive searches whenever possible.

The final factor to be considered is the "nature of the infraction." *T.L.O.*, 469 U.S. at 342, 105 S.Ct. 733. This is by far the thorniest part of the analysis, for *T.L.O.* has given us conflicting directions.

The Court expressly stated that the "nature of the infraction" is part of the "scope" analysis. *Id.* at 342, 105 S.Ct. 733. It also emphatically rejected Justice Stevens' "suggestion that some rules regarding student conduct are by nature too 'trivial' to justify a search based upon reasonable suspicion." *Id.* at 342 n. 9, 105 S.Ct. 733. These two propositions are easily compatible if the nature of the infraction is irrelevant to whether a search was justified at its inception, but properly considered in determining whether the search was permissible in scope. *Cf. supra* note 3. Indeed, as a matter of black letter law, this appears to be the proper way to understand the *T.L.O.* doctrine.

In criticizing Justice Stevens' views, though, the Court used language that suggests that deference to

school officials' judgment pervades the entire reasonableness analysis. The Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." *T.L.O.*, 469 U.S. at 342 n. 9, 105 S.Ct. 733. Instead, courts "should, as a general matter, defer to [school officials'] judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not." *Id.*

This passage complicates matters.[18] By evaluating the nature of the infraction, as we are told we must do, we will in many cases end up second-guessing school officials' judgment. To find a search excessively intrusive in light of a student's harmless behavior is to hold that teachers and administrators, notwithstanding their greater expertise and better familiarity with their particular school and students, overestimate the threat a given infraction posed to the educational environment.

Although this presents considerable analytical tension, we can manage the difficulty by adopting some

---

18. *Cf. Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (11th Cir.1997) (en banc) (granting qualified immunity to officials who conducted *T.L.O.* search because "[f]aced with a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other, it is difficult to discern how *T.L.O.* could be interpreted to compel the conclusion that these defendants . . . should have known that their conduct violated a clearly established constitutional right").

general rules. First, no school rule is too trivial to allow for *some* form of search. Even the most harmless violations of school policy—chewing gum, wearing hats, passing notes—threaten the educational environment by virtue of the student engaging in prohibited activity. School officials have a strong interest in inculcating discipline and eliminating distractions from the classroom.[19] This interest would surely allow a teacher to order a student to disclose what she is concealing in her hand, or to require a student to stand up and reveal what is hidden on a chair. Such *mala prohibita*, however, will rarely justify significantly intrusive searches.

Second, school officials deserve the greatest latitude when responding to behavior that threatens the health and safety of students or teachers. We can distinguish, then, between a search for a stolen hat and a search for a stolen inhaler or stolen insulin. Similarly, when school officials reasonably believe that a student is carrying a weapon or harmful drugs, it will rarely be unreasonable for them to do what they can to neutralize the danger.

Third, as a corollary to the previous rule, courts should distinguish between two types of searches for harmful objects: those intended to uncover evidence of past wrongdoing, and those responding to an ongoing or future threat. A search for heroin-loaded syringes deserves the utmost deference, whereas a search for

---

19. As Justice Blackmun charmingly stated, "Every adult remembers from his own schooldays the havoc a water pistol or peashooter can wreak until it is taken away." *T.L.O.*, 469 U.S. at 352, 105 S.Ct. 733 (Blackmun, J., concurring in the judgment).

used and empty ones may, at some point of intrusiveness, be better left to parents or law enforcement.

Finally, we should resist using our independent judgment to determine what infractions are so harmful as to justify significantly intrusive searches. Seemingly innocuous items can, in the hands of creative adolescents, present serious threats. Courts may not immediately appreciate the wisdom of a school policy that bans, say, aerosol spray cans, but that is why judges are not chosen to run schools.[20]

Relatedly, if a school board wishes to prohibit students from bringing scissors to school for fear that they may be used as weapons, we should not require that the school board defend the policy by establishing that there is a history of scissor-stabbing at the school. Schools are entitled to stay one step ahead of tragedy. Likewise, if a teacher has reasonable suspicion that a student is violating the scissor policy, he should be entitled to assume, absent contrary evidence, that the student has the worst intentions. Ordinarily, the teacher-student relationship should be suffused with trust. But when a student presents a potential threat of harm to himself or others, we should not require school officials to be optimistically naive. Searches are often fruitless,

---

20. Although aerosol spray cans and bottles pose little threat to a responsible user, death can result "from a single session of inhalant use by an otherwise healthy young person." Nat'l Inst. on Drug Abuse, U.S. Dep't of Health & Human Servs., *Inhalants* 2 (June 2007), *available at* http:// www. nida. nih. gov/ PDF/ Infofacts/~Inhalants 07. pdf.

and students' motives are often benign, but teachers, unlike courts, do not act with the benefit of hindsight.

Although a close call, this analytical framework leads to the conclusion that the search of Redding was permissible in scope.

The measures adopted in this case were reasonably related to finding ibuprofen. Assuming that the search was justified at its inception (as we must in the "scope" analysis), Wilson had reason to believe that Redding possessed small pills. There was no indication where those pills might be, however. A search of Redding's backpack turned up nothing, and she was wearing clothes without any pockets that day. There is no question that the pills could physically be concealed in Redding's underwear in a way that would avoid superficial observation.

Absent evidence that pills were not under Redding's clothes, it hardly seems irrational that they might be concealed in places that only a more intrusive search would uncover. *See Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 887 (6th Cir.1991) (upholding "strip search" that occurred after officials failed to find a small glass vial in student's locker and purse because at that point "it was reasonable . . . to suspect the girl may be concealing the contraband on her person").

As a doctrinal matter, we should distinguish searches that are unreasonable because of an insufficient probability of success from searches that are

unreasonable because of excessive intrusiveness.[21] In Redding's case, I believe it is the intrusiveness of the search that should give us pause, but not Wilson's suspicion that pills might be hidden under clothes.

As for the second step of the inquiry—the intrusiveness of the search in light of the attributes of the student—I have no disagreement with the majority's thorough discussion of the impact of "strip searches" on young teenagers. Redding testified to being "embarrassed and scared" and on the verge of tears, and, undoubtedly, most children would have had the same reaction.

We must remember, however, that *T.L.O.* does not prohibit searches that achieve some absolute level of intrusiveness. Rather, the question is one of proportion, for searches are only unreasonable if they are "*excessively* intrusive." *T.L.O.*, 469 U.S. at 342, 105 S.Ct. 733 (emphasis added). No court should ignore the profound effect that a highly intrusive search has on a thirteen-year-old girl, but a conclusion about reasonableness can come only after we consider the impetus for the search.

---

21. This is not to say that an intrusive search cannot be more or less reasonable based on the level of information available to officials. Ordinarily I would consider this as a fourth step in the "scope" inquiry. *See supra* note 3. The majority, however, has decided that this is best analyzed under the justified-at-its-inception analysis by requiring greater suspicion for more intrusive searches. For the ease of responding, I have employed that same framework today.

Appendix A

We turn, then, to the "nature of the infraction." The majority holds that prescription-strength ibuprofen is simply too harmless to permit the search at issue. Majority at 1086. In doing so, it implicitly expresses disagreement with the Safford Middle School's District Policy that prohibits "[t]he non-medical use, possession or sale of . . . [a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted."

In my view, the outcome of the case depends on the deference we give to school officials' judgment. The school policy was not adopted solely to create an environment more conducive to learning; rather, it reflects the District's view that even over-the-counter drugs can be harmful when used for non-medical purposes. Given the school officials' greater expertise, we should credit their beliefs.

Admittedly, ibuprofen is one of the mildest drugs children could choose to abuse. But that does not mean it is never harmful.

According to the Physicians' Desk Reference entry for Motrin IB, children under the age of twelve should only use the drug as directed by a doctor.[22] Physician's Desk Reference 1882 (62nd ed.2008). Children who ingest 100 to 200 milligrams of ibuprofen per kilogram

22. Redding was thirteen at the time of the search, but Wilson did not have to assume that she would have scrupulously distributed the pills based on her schoolmates' age, weight, and medical history.

of body weight "may be managed with induced emesis," and children who ingest 200 to 400 mg/kg "should have immediate gastric emptying and at least four hours observation in a health care facility. Children ingesting greater than 400 mg/kg require immediate medical referral, careful observation and appropriate supportive therapy." *Id.* at 1883. Even adults can suffer "severe allergic reaction." *Id.* at 1882. When taken in combination with other nonsteroidal anti-inflammatory drugs (such as aspirin or naproxen), blood thinners, or steroid drugs, ibuprofen can cause stomach bleeding. *Id.*

This information supplies a rational basis for the school's policy, given officials' concern for the health of their students, including those who were planning to abuse the ibuprofen. Once we rule out irrationality, we should categorize this search as one aimed at protecting the safety of children and grant the Safford Officials the appropriate latitude. Any greater parsing of their decision is inconsistent with the deference owed to school officials, and we should not create a rule that will cause teachers and administrators to hesitate when they in good faith believe children are at risk. While this court enjoys the luxury of studying ibuprofen's medical profile and debating its dangerousness, Wilson did not. *See Williams*, 936 F.2d at 886 ("To question an official's every decision with the benefit of hindsight would undermine the authority necessary to ensure the safety and order of our schools.").

Importantly, Wilson was not searching for evidence of past ibuprofen use, such as an empty Advil bottle.

He was acting on specific information that children in school had pills and were planning on taking them later that day.

The majority would be content to have Redding sent "home for the afternoon to prevent the rumored lunchtime distribution from taking place." Majority at 1086-87. Or, the majority says, Redding could have been held, but not intrusively searched, in Wilson's office because she would have had no means to distribute the pills that afternoon. This demonstrates a misunderstanding of the temporal nature of the threat. The students were not planning to rob the 3:10 train to Yuma; they were going to pop pills. The danger would not be "neutralized" by holding Redding for the afternoon, Majority at 1087, it would simply be postponed until the students left school or until lunchtime the next day. Let us be realistic: Had Wilson *not* acted swiftly and decisively, and had a child fallen ill, the community would have been outraged by the school's laxity.

It may be that Wilson overestimated the risk to Redding and others. Indeed, I am sure there are other reasonable school officials who would have simply sent her back to class after an unsuccessful backpack search. Certainly, the Fourth Amendment did not require that Redding endure this particular search. But under these circumstances, I do not think it was unreasonable for school officials, acting in good faith, to conduct the search in an effort to obviate a potential threat to the health and safety of their students.

Appendix A

III. The Reasonableness of the Safford Officials' Actions

The prior discussion on the constitutional question foreordains the treatment of the qualified immunity issue. The "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Because the Safford Officials' "mistake as to what the law requires [was] reasonable," they all are entitled to qualified immunity. *Id.* at 205, 121 S.Ct. 2151.

To its credit, the majority frames Redding's Fourth Amendment right with a degree of particularity that allows for a meaningful clearly—established analysis. *See Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The issue is whether, under *T.L.O.*, "the right of a thirteen-year-old girl to be free from strip searches on suspicion of possessing ibuprofen [was] clearly established in 2003." Majority at 1087. In answering this question, we must be mindful that "[q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Lee v. Gregory*, 363 F.3d 931, 934 (9th Cir.2004) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

We begin our examination by looking at the case law that existed at the time the Safford Officials authorized the search. *Inouye v. Kemna*, 504 F.3d 705, 712 (9th

Cir.2007). " 'Absent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established.' " *Id.* at 714 (quoting *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir.1996)).

Surprisingly, the majority skips this exercise entirely, failing to cite a single *T.L.O.* search case, aside from *T.L.O.* itself, that existed prior to October 2003. Although it is true that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), this should not excuse us from first attempting to see whether any relevant cases exist. Earlier cases may provide authority that clearly establishes a right, but they may also create the legal ambiguity that allows a reasonable official to invoke the protections of the qualified immunity defense. *See Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir.1989) ("[T]he absence of binding precedent in this circuit plus the conflict between the circuits is sufficient, under the circumstances of this case, to undermine the clearly established nature of a right.").

As it turns out, there are multiple *T.L.O.* search cases from other circuits that the Safford Officials could have consulted. In *Cornfield ex rel. Lewis v. Consolidated High School District No. 230*, the Seventh Circuit upheld a strip search of a sixteen-year-old student who officials had reason to believe was

"crotching" drugs. 991 F.2d 1316, 1323 (7th Cir.1993).[23] A district court in Kansas found constitutional a search of a thirteen-year-old boy in which the school official "patted" the boy's crotch, removed the boy's socks and shoes, lowered his pants, and "searched the inside waist band of his boxer shorts." *Singleton v. Bd. of Educ.*, 894 F.Supp. 386, 389, 390-91 (D.Kan.1995). The search followed an uncorroborated tip from an adult woman that the boy had taken $150.00 from her car. *Id.* at 388.

Although the majority criticizes the Redding search because there was no indication that she had pills in her underwear, the Sixth Circuit upheld a "strip search" of a high school student for an unknown drug, even though there was no evidence that the student actually possessed it under her clothes. *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 887 (6th Cir.1991). Relating to the majority's discussion of student informers, the Eleventh Circuit found reasonable a search of a high school student's coat pockets for drugs based solely on the tip of a student who lacked any

---

23. The majority opines that: " 'It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity.' " Majority at 1088. This quote originated in a Seventh Circuit case, *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir.1980) (per curiam). Despite this precedent, the Seventh Circuit in *Cornfield* upheld a strip search, explaining that *Doe's* "sharp condemnation . . . stemmed from the fact that the strip search of Doe was executed without any individualized suspicion and without reasonable cause." 991 F.2d at 1324.

personal knowledge and was simply relaying information received from an anonymous third party. *C.B. ex rel. Breeding v. Driscoll*, 82 F.3d 383, 385, 388 (11th Cir.1996).

Of course, each of these cases can be factually distinguished from the present one, but the Safford Officials had no way of knowing whether the different facts were constitutionally significant—that is, there was little indicating which facts were sufficient to uphold those searches, and which facts were necessary.

Not only are there cases that support the constitutionality of Redding's search, there are also cases that grant qualified immunity to officials who conducted unconstitutional *T.L.O.* searches.

In *Jenkins ex rel. Hall v. Talladega City Board of Education*, an en banc panel of the Eleventh Circuit was presented with "strip searches" of *eight-year-old* second graders that were undertaken to find *seven dollars* that had gone missing from a classmate's purse. 115 F.3d 821, 822 (11th Cir.1997) (en banc). The court refused to even decide the constitutionality of the searches, instead granting qualified immunity to the officers straight away because the *T.L.O.* test was too vague and unspecific to clearly establish law that could put the teachers on notice. *Id.* at 824-28.

The Eleventh Circuit dealt with another "strip search" in *Thomas ex rel. Thomas v. Roberts* (*Thomas I*), 261 F.3d 1160 (11th Cir.2001), *vacated*, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 829 (2002),

reinstated, (*Thomas II*) 323 F.3d 950, 952 (11th Cir.2003). Following a reported disappearance of an envelope containing twenty-six dollars, a teacher and police officer (who happened to be there to teach a drug awareness class) conducted a mass search of an entire fifth grade class that was much more intrusive than the one Redding endured here. *Id.* at 1163-64.

The male officer took the boys to the bathroom and actually pulled his own pants and underwear down in front of them to show them what they were supposed to do. *Thomas I*, 261 F.3d at 1164. He then threatened them with suspension or jail if they failed to do as ordered. *Id.* It appears that the boys were required to get naked in front of each other, and one boy testified that two girls he knew saw him with his pants down because the officer had left the bathroom door open. *Id.* The girls had a similar experience with the female teacher, who forced them, in groups of two to five, to lower their pants and raise their dresses or shirts. Most were told to lift their bras and expose their breasts, and some were touched by the teacher in the process. *Id.*

Following the analysis set forth in *Acton*, the court held that the searches violated the students' Fourth Amendment rights. *Thomas I*, 261 F.3d at 1169. It nevertheless granted qualified immunity to the defendants, stating that "[i]f the salient question is whether *T.L.O.* gave the defendants 'fair warning' that

a 'strip search' of an elementary school class for missing money would be unconstitutional, then the answer must be 'no.' "[24] *Thomas II*, 323 F.3d at 954.

The search we confront today is less clearly unconstitutional than those described in *Jenkins* and *Thomas*. Yet the Eleventh Circuit effectively held in both cases that *T.L.O.* is too vague to enable school officials to determine whether a particular search will be considered reasonable.[25]

The majority disagrees with all this, finding that *T.L.O.* provided sufficient notice to Wilson. *T.L.O.* is obviously relevant in that it established "the legal framework." Majority at 1088. That framework, however, has been roundly criticized as too ill-defined to allow school officials to reasonably determine the constitutionality of possible searches. Put simply, *T.L.O.* will rarely supply enough guidance to "put the officer

---

24. *Thomas II* was decided in March 2003, some seven months before the Redding search. It did not provide the necessary guidance to the Safford Officials, however, because it involved an *Acton* search (no individualized suspicion).

25. In support of its constitutional discussion, the majority approvingly cites *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir.2006), which declared a "strip search" to be unconstitutional. Significantly, *Phaneuf* was remanded to the district court to determine whether the defendants were entitled to qualified immunity, *id.* at 600, and the district court found that they were, *Phaneuf v. Cipriano*, No. 3:03CV0372, 2007 WL 274535, at *5-*6, 2007 U.S. Dist. LEXIS 5963, at *17-*18 (D. Conn. Jan 25, 2007).

on notice that his conduct would be clearly unlawful." *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151.

This criticism was first voiced by the *T.L.O.* dissenters. Justice Brennan lamented that the "amorphous" reasonableness standard would "likely spawn increased litigation and greater uncertainty among teachers and administrators. . . . I cannot but believe that [schools] faced with interpreting what is permitted under the Court's new 'reasonableness' standard would be hopelessly adrift as to when a search may be permissible." *T.L.O.*, 469 U.S. at 365-66, 105 S.Ct. 733 (Brennan, J., dissenting).

Justice Stevens concluded that the *T.L.O.* standard "is so open-ended that it may make the Fourth Amendment virtually meaningless in the school context." *Id.* at 385, 105 S.Ct. 733 (Stevens, J., dissenting). "The Court's effort to establish a standard that is, at once, clear enough to allow searches to be upheld in nearly every case, and flexible enough to prohibit obviously unreasonable intrusions of young adults' privacy only creates uncertainty in the extent of its resolve to prohibit the latter." *Id.* at 381, 105 S.Ct. 733.

Lower courts have echoed these observations. In *Thomas II*, the Eleventh Circuit stated that

> *T.L.O.*'s balancing test will, in most instances, call for school officials to speculate as to whether a court applying the balancing test to specific facts would find a search

> unreasonable. . . . [W]here the applicable legal standard is a highly general one, such as "reasonableness," preexisting caselaw that has applied general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct will violate federal law.

Thomas II, 323 F.3d at 954. *Jenkins* noted that *T.L.O.* did not even "apply its own test strictly to the facts presented in that case." *Jenkins*, 115 F.3d at 824. Although *T.L.O.* stated that a search must not be overly intrusive in light of the age and sex of the student and the nature of the infraction, "notably absent from the Court's discussion and conclusion" is any application of these considerations, and "[t]here is no illustration, indication, or hint as to *how* the enumerated factors might come into play when other concrete circumstances are faced by school personnel." *Id.* at 825.

> In the absence of detailed guidance, no reasonable school official could glean from these broadly-worded phrases whether the search of a younger or older student might be deemed more or less intrusive; whether the search of a boy or girl is more or less reasonable, and at what age or grade level; and what constitutes an infraction great enough to warrant a constitutionally

> reasonable search or, conversely, minor enough such that a search of property or person would be characterized as unreasonable.

Id. at 825-26; *see also Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir.2005) ("[T]he[*T.L.O.*] Court did little to explain *how* the factors should be applied in the wide variety of factual circumstances facing school officials today."); *Williams*, 936 F.2d at 886 ("[T]he reasonableness standard . . . has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. § 1983 cause of action.").

Today, this court brushes all these objections aside. Wilson, it explains, should have known better, for "[c]ommon sense and reason supplement the federal reporters." Majority at 1088.

It is of no small consequence to this analysis that three of the first four judges to address this issue found the Redding search to be constitutional, and two more judges on this en banc panel are of the same view. The majority feels that Wilson, with no legal training, should have known better.

Looking forward, the denial of qualified immunity may have the greatest impact on this circuit's schools. It is now clear that school officials who conduct *T.L.O.* searches that judges later think unreasonable will face

trial and the possibility of damages, without any case law to guide them and no means of divining our views of "common sense and reason."

IV. *Saucier v. Katz*

Earlier this year, the Supreme Court granted certiorari in *Pearson v. Callahan*, __ U.S. __, 128 S.Ct. 1702, 170 L.Ed.2d 512 (2008) (mem.). In that grant, the Court ordered the parties to brief and argue "[w]hether the Court's decision in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) should be overruled?" *Pearson*, 128 S.Ct. at 1702-03. For me, this case is a poster child for ending *Saucier's* "right first, clearly established later" requirement.

Saucier instructed courts to follow a "rigid order of battle" in cases involving claims of qualified immunity. *Brosseau v. Haugen*, 543 U.S. 194, 201-02, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (Breyer, J., concurring) (internal quotation marks omitted). The threshold question is whether the facts show that an official's conduct violated a constitutional right. *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. Only after having done so may the court then decide whether the right was clearly established. *Id.*

Saucier transformed what was once a best-practice approach to resolving qualified immunity cases into a mandatory, two-step inquiry. *Compare County of Sacramento v. Lewis*, 523 U.S. 833, 841 n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (describing the two-step inquiry as "the better approach"), *with Saucier*, 533 U.S.

at 201, 121 S.Ct. 2151. Whereas courts used to be able to skip the substantive constitutional question in cases where an official would clearly prevail on the qualified immunity issue, now we must labor to resolve the constitutional issue first.

Since it was decided, *Saucier* has been criticized by judges and scholars for having created a doctrine that is impractical, unduly burdensome, imprudent, and possibly unconstitutional. Citing some of these reasons, twenty-eight states filed a Supreme Court brief a few years ago urging that *Saucier* be abandoned. Brief for the State of Illinois et al. as *Amici Curiae* in Support of Petitioner, *Scott v. Harris*, __ U.S. __, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (No. 05-1631). There is no need to review these criticisms, as they have been well developed elsewhere. *See, e.g., Brosseau*, 543 U.S. at 201-02, 125 S.Ct. 596 (Breyer, J., concurring); *Clement v. City of Glendale*, 518 F.3d 1090, 1093 n. 4 (9th Cir.2008) (Kozinski, C.J.) ("[T]he *Saucier* rule may lead to the publication of a lot of bad constitutional law that is, effectively, cert-proof."); *Lyons v. City of Xenia*, 417 F.3d 565, 580-84 (6th Cir.2005) (Sutton, J., concurring); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L.Rev. 847, 872-82 (2005); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L.Rev. 1249, 1275-81 (2006).

As noted at the onset, this case is a particularly good example of why courts should not be *required* to resolve constitutional questions before finding that a defendant is entitled to qualified immunity.

Appendix A

The primary rationale behind a mandatory order of battle is that constitutional law will stagnate and constitutional rights will remain immature if courts do not take the time to develop the jurisprudence at every possible opportunity. With some constitutional doctrines, or with respect to some recurring scenarios, this may be true. Courts recognizing those situations would be wise to take the time to resolve the constitutional question.

In other situations, though, a doctrine is so inherently fact-driven that a precedent will provide very little helpful guidance. Today's case is illustrative. School officials in this circuit are now on notice that it is unconstitutional to require a thirteen-year-old female honor student to remove her outer garments and shake her bra and underwear, partially exposing her breasts and pelvic area, in front of two female administrators in a private room when the object sought is prescription-strength ibuprofen and the only direct evidence against her is the uncorroborated tip of a culpable classmate, and the girl searched has no disciplinary history but has been suspected of consuming and serving alcohol.

This precise holding is the only thing officials can rely on. There is no way of knowing in advance which of these facts could be altered, and to what degree, in order to find a search reasonable. This is not the majority's fault; it is a necessary function of the *T.L.O.* reasonableness test, which eschews any clear rules in favor of a highly abstract balancing standard that is

meant to reflect nothing more than "the dictates of reason and common sense." *T.L.O.*, 469 U.S. at 343, 105 S.Ct. 733.

Of course, because the majority found that a constitutional right was violated at a time when it was clearly established, *Saucier* did not affect the outcome of this case. As a member of the three-judge panel that found the search to be constitutionally reasonable, and as the author of today's dissent, I would have preferred to grant summary judgment based solely on the qualified immunity issue.

This would have been prudent as a constitutional matter, as we were forced to decide this case with a very limited evidentiary picture: the record is comprised of only five affidavits totaling eighteen pages.

Separate from the particulars of today's case, one additional comment about *Saucier* is in order. By recognizing qualified immunity for an official, a court necessarily holds that the official's mistake was reasonable because pre-existing law did not provide fair notice that the conduct was unlawful. *Brosseau*, 543 U.S. at 198, 125 S.Ct. 596 (per curiam). Such a ruling may be cold comfort, however, when that official is simultaneously branded a constitutional violator. Whatever thought that person may have had for future positions of public trust will likely be abandoned, for the public at large cannot be expected to have any familiarity with the qualified immunity doctrine. Overruling *Saucier*, if the Supreme Court chooses to

do so, would enable us to spare the reputations and careers of competent officials who, while acting in good faith, do nothing more than commit a reasonable mistake.

When deciding *Pearson*, we can hope the Supreme Court will have an opportunity to consider the utility of *Saucier* in those areas of constitutional law that spawn a substantial number of relatively useless precedents. Today's decision, along with the rest of *T.L.O.'s* progeny, would be a great place to start.

Conclusion

This is a difficult case. This dissent has approached the issues, as the majority has, "mindful of the limitations of the judicial function in controlling the myriad daily situations in which [school officials] and [students] confront each other on [campus]." *Terry*, 392 U.S. at 12, 88 S.Ct. 1868. The majority understandably empathizes with Redding, giving due regard to the humiliation and degradation she suffered. And were it not for my different understanding of the principles articulated in *T.L.O.*, I might very well have joined today's opinion. That case, however, counsels deference to school officials. For that reason, I would find this search constitutional, and would certainly forgive the Safford Officials' mistake as reasonable.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 21, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-15759

D.C. No.
CV-04-00265-NFF

APRIL REDDING, legal guardian of minor child,

Plaintiff-Appellant,

v.

SAFFORD UNIFIED SCHOOL DISTRICT # 1; KERRY WILSON, husband; JANE DOE WILSON, wife; HELEN ROMERO, wife; JOHN DOE ROMERO, husband; PEGGY SCHWALLIER, wife; JOHN DOE SCHWALLIER, husband,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Nancy Fiora, Magistrate Judge, Presiding.

Argued and Submitted
March 8, 2008—Tempe, Arizona

Filed September 21, 2007

Appendix B

Before: Michael Daly Hawkins, Sidney R. Thomas, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Clifton;
Dissent by Judge Thomas

OPINION

CLIFTON, Circuit Judge:

Plaintiff-Appellant Savana Redding, a minor, by her mother and legal guardian, appeals from the district court's order entering summary judgment in favor of Defendants Kerry Wilson, Helen Romero, Peggy Schwallier, and the Safford Unified School District, in this 42 U.S.C. § 1983 action for monetary damages. Redding alleges that Defendants violated her Fourth Amendment rights by conducting a warrantless search of her person during school hours and on school premises. Because we conclude that Defendants did not violate Redding's Fourth Amendment rights, we affirm the district court's order.

I. Background

A few years ago, Safford Middle School in Safford, Arizona, adopted a policy prohibiting the "nonmedical use, possession, or sale of drugs on school property or at school events." The term "drugs" is defined by the policy as including, but not limited to: (1) "[a]ll dangerous controlled substances prohibited by law," (2) "[a]ll alcoholic beverages," and (3) "[a]ny prescription or over-

the-counter drug, except those for which permission to use in school has been granted." Although it is not entirely clear from the record, it appears that the school implemented this policy in response to a prior incident, in which a student brought a prescription drug to school and distributed it to classmates, one of whom became seriously ill and was hospitalized.[1]

On August 22, 2003, Safford Middle School held a dance to commemorate the beginning of a new school year. During the dance, several staff members from the school noticed "unusually rowdy behavior" from a small group of students, including Redding, who was then thirteen years old and entering eighth grade, and her friend Marissa. The staff members also detected the smell of alcohol coming from that group. Later that evening, staff members found a bottle of alcohol and a package of cigarettes in the girls' restroom. No official action was taken against any of the students at that time.

On October 1, 2003, Jordan, another student at Safford Middle School, along with his mother, requested a meeting with Principal Robert Beeman and Vice Principal Kerry Wilson. During the meeting, Jordan's

1. Defendant Wilson alleged in his affidavit that Safford Middle School suffers from a "history of problems with students using and distributing prohibited and illegal substances on campus." In her affidavit, Redding disputed this allegation. Because this is an appeal from an order granting summary judgment to Defendants, we accept Redding's version of disputed facts as true. *See Drummond v. City of Anaheim*, 343 F.3d 1052, 1054 n. 1 (9th Cir.2003).

mother explained that a few nights before, Jordan had become violent with her and was sick to his stomach. Jordan claimed that the incident occurred after he had taken some pills a classmate had given him. Jordan went on to inform Beeman and Wilson that certain students were bringing drugs and weapons to school. He then gave the administrators detailed accounts regarding the actions of several students, including Redding. Specifically, Jordan informed Beeman and Wilson that Redding had served alcohol to her classmates at a party she hosted at her home prior to the dance in August.[2]

On the morning of October 8, 2003, Jordan again asked to meet with Vice Principal Wilson. During the meeting, Jordan handed Wilson a white pill and said that Marissa had given it to him and that a group of students were planning to take pills at lunch. Upon learning this information, Wilson took the pill to Peggy Schwallier, the school nurse, and asked her to identify it. Schwallier identified it as "Ibuprofen 400 mg," a pill available only by prescription.

Based on this information, Wilson went to Marissa's classroom and asked Marissa to collect her belongings and accompany him to his office. As Marissa got up to comply, Wilson noticed a black planner lying on the desk next to hers. Wilson asked Marissa whether the planner

---

2. In her affidavit, Redding admitted that she hosted a small get-together at her house prior to the dance, but denied serving alcohol. According to Redding, "[t]he only beverage served at the gathering was soda." We accept Redding's version of this disputed fact. *See Drummond*, 343 F.3d at 1054 n. 1.

belonged to her and Marissa said no. Wilson nevertheless picked up the planner and handed it to a teacher, who promised that he would attempt to find the owner. Soon thereafter, the teacher discovered that the planner contained knives, lighters, a cigarette, and a permanent marker. He promptly communicated this information to Wilson.

Wilson escorted Marissa back to his office and invited Helen Romero, an administrative assistant, to come in to observe. In Romero's presence, Wilson asked Marissa to turn out her pockets and open her wallet. Marissa did so, producing one blue pill, several white pills, and a razor blade. The blue pill was later identified as "Naprosyn 200 mg," an over-the-counter drug used to treat pain and inflammation. Wilson asked Marissa where the blue pill had come from, and Marissa replied: "I guess it slipped in when she gave me the IBU 400s." When Wilson asked "who is she?," Marissa responded, "Savana Redding." Wilson then questioned Marissa about the black planner. Marissa denied ownership of the planner and claimed she had no knowledge of its contents.

At this point, Wilson asked Romero to take Marissa into the nurse's office and conduct a search of Marissa's person and clothing for pills. Romero complied. She took Marissa into the nurse's office and closed the door, which locked automatically. She then invited school nurse Schwallier to observe. In Schwallier's presence, Romero asked Marissa to: (1) remove her shoes and socks, (2) lift up her shirt and pull out her bra band,

and (3) take off her pants and pull out the elastic of her underwear. Marissa complied with each request. The search of Marissa's person and clothing did not yield any more pills, and as soon as the search was over, Romero returned Marissa's clothes and permitted her to get dressed.

While Romero and Schwallier searched Marissa, Wilson retrieved Redding from her classroom and asked her to accompany him to his office. When they arrived, Wilson first admonished Redding about the importance of telling the truth. After Redding assured Wilson that she would be truthful, Wilson showed Redding the black planner he had found near Marissa's desk. Redding acknowledged that the planner belonged to her but claimed that she had lent it to Marissa several days earlier to help Marissa hide some things from her parents. Redding denied having any knowledge of the planner's contents.

Wilson then showed Redding the pills he had seized from Marissa and asked her what she could tell him about them. After Redding denied having knowledge of the pills, Wilson told Redding that he had received a report that she had been passing the pills out to her classmates and asked Redding if she would object to being searched. Redding denied bringing pills to school, denied distributing pills to her classmates, and told Wilson that she did not mind being searched. Wilson then invited Romero into his office, and together, they conducted a search of Redding's backpack. After the search proved fruitless, Wilson asked Romero to take

Redding into the nurse's office and conduct a search of her person. Romero complied.

Romero took Redding into the nurse's office and again invited Schwallier to observe. At the time of the search, Redding was wearing "stretch pants without pockets and a T-shirt without pockets." In Schwallier's presence, Romero asked Redding to: (1) remove her jacket, shoes, and socks, (2) remove her pants and shirt, (3) pull her bra out and to the side and shake it, exposing her breasts, and (4) pull her underwear out at the crotch and shake it, exposing her pelvic area. The search did not produce any pills. Immediately after it had concluded, Defendants returned Redding's clothes and allowed her to get dressed. At no point during the search did either Schwallier or Romero touch Redding. Prior to the search, no attempt was made to contact Redding's mother.

Redding subsequently brought this 42 U.S.C. § 1983 action against Wilson, Romero, Schwallier, and the Safford Unified School District. She alleges that Defendants' search of her person violated her Fourth Amendment rights. Defendants moved for summary judgment, arguing that they did not violate Redding's constitutional rights, and that even if they did, they were entitled to qualified immunity because the law was not "clearly established" at the time the search took place. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The district court granted Defendants' motion for summary judgment, holding that Defendants did not violate Redding's Fourth

Amendment rights because their search of Redding's person was both justified at its inception and permissible in its scope. *See New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). Redding timely appealed from the district court's order.

II.Discussion

We review *de novo* the district court's grant of summary judgment. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir.2005). In doing so, "we view the evidence in the light most favorable to . . . the non-moving party, and accept the version of all disputed facts most favorable to[that party]." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1054 n. 1 (9th Cir.2003).

The fundamental principle that "students do not 'shed their constitutional rights . . . at the schoolhouse gate' " is beyond reasonable dispute. *Morse v. Frederick*, __ U.S. __, 127 S.Ct. 2618, 2622, 168 L.Ed.2d 290 (2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)). At the same time, the Supreme Court has admonished us that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" and that "the rights of students must be applied in light of the special characteristics of the school environment." *See id.* (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98

L.Ed.2d 592 (1988)) (internal quotation marks omitted). It is in this context that we evaluate the constitutionality of the challenged search.

The search of Redding's person was conducted by public school officials and took place during school hours and on school premises. The validity of the search is, therefore, governed by *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). In that case, the Supreme Court held that the Fourth Amendment's protection against unreasonable searches and seizures extended to searches of students by public school officials and set forth the constitutional standard for adjudging the "reasonableness" of such searches. *See id.* at 333-37, 341-43, 105 S.Ct. 733; *see also Bd. of Educ. v. Earls*, 536 U.S. 822, 828, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) ("We must . . . review the School District's [search policy] for 'reasonableness,' which is the touchstone of the constitutionality of a governmental search."). According to the Court, the search of a student by a public school official is reasonable under the Fourth Amendment if it is both: (1) "justified at its inception," and (2) "reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 U.S. at 341, 105 S.Ct. 733 (citing *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)) (internal quotation marks omitted). Under *T.L.O.*, a search is justified at its inception if there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-42, 105 S.Ct. 733. A search is permissible in

its scope if "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342, 105 S.Ct. 733.

We agree with the district court that Defendants' search of Redding satisfied both of the *T.L.O.* criteria.

1. The Search was Justified at its Inception

Based on the information available to them, Defendants had "reasonable grounds" for suspecting that the search of Redding's person would turn up evidence that Redding had "violated or [was] violating either the law or the rules of the school." *See T.L.O.*, 469 U.S. at 341-43, 105 S.Ct. 733. At the time Defendants searched Redding, they had several key pieces of information tying her to the possession and distribution of pills in violation of school policy. Earlier that morning, Jordan told Vice Principal Wilson that Marissa possessed pills, had distributed at least one of those pills to Jordan, and planned to get together with a group of students to take pills at lunch. Wilson discovered pills on Marissa's person during his search of her pockets and wallet. Marissa then volunteered that she had gotten the pills from Redding.

While decisional law from this circuit is sparse, other circuits have held that students who provide information implicating other students in illegal or otherwise prohibited activities are tantamount to "informants,"

and have used case law from the criminal context to determine the circumstances under which such students' "tips" could give rise to reasonable suspicion sufficient to justify a search. *See, e.g., Phaneuf v. Fraikin,* 448 F.3d 591, 597-99 (2d Cir.2006); *Williams v. Ellington,* 936 F.2d 881, 888 (6th Cir.1991) ("We can correlate the allegations of a student, implicating a fellow student in unlawful activity, to the case of an informant's tip.").

In *Phaneuf,* for example, the Second Circuit held that a student informant's allegation regarding another student's marijuana possession, while warranting "additional inquiry and investigation," failed to justify the ensuing search of the suspected student's person. *Phaneuf,* 448 F.3d at 598-99. The court noted that while the student informant made the tip "face-to-face," claimed that her knowledge was based on a "direct conversation" with the plaintiff, and gave "relatively specific" information, her tip was nevertheless inadequate because there was no concrete evidence of her reliability, and the defendants had failed to make any effort to "investigate, corroborate, or otherwise substantiate [the tip] prior to ordering the strip search." *Id.* at 598.

By contrast, in *Williams,* the Sixth Circuit held that a student informant's tip sufficed to justify the ensuing search of another student's person. 936 F.2d at 889. In that case, the court recognized that "[w]hile there is concern that students will be motivated by malice and falsely implicate other students in wrongdoing," it noted that the defendant in *Williams* had "carefully

questioned [the student informant] about any improper motive for making the allegations, and was satisfied none existed." *Id.* at 888-89. In addition, the court pointed out that there was at least some independent evidence, separate and apart from the student's tip, that could have led the defendant to "reasonably suspect [the plaintiff of] concealing evidence of illegal activity on her person." *Id.* at 889.

The instant case is more analogous to the circumstances of *Williams*. Like the defendant in that case, Wilson did not order the search of Redding's person based solely on an uncorroborated tip. *Cf. Phaneuf*, 448 F.3d at 598 ("[Defendant's] acceptance of one student's accusatory statement to initiate a highly intrusive search of another student—with no meaningful inquiry or corroboration--concerns us."); *see also id.* at 598-99 ("While[an] uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search."). To the contrary, he made diligent efforts to "investigate, corroborate, or otherwise substantiate [the tip]" prior to ordering the search. *Cf. id.* at 598. Upon receiving Jordan's tip, which was given face-to-face, Wilson took reasonable steps to investigate Marissa, whom Jordan had implicated. *See United States v. Salazar*, 945 F.2d 47, 50-51 (2d Cir.1991) ("[A] face-to-face informant must, as a general matter, be thought more reliable than an anonymous . . . tipster, for the former runs the greater risk that he may be held accountable if his information proves false."). He interviewed Marissa, asked her a number

of in-depth questions regarding the pills, and conducted a search of her person and belongings. After Wilson discovered pills, Marissa immediately attributed them to Redding. Even then, Wilson still refrained from immediately conducting a search of Redding's person. To the contrary, he questioned Redding about her knowledge of the pills and her ownership of the black planner. It was only after Redding had acknowledged ownership of the planner, acknowledged her friendship with Marissa, and conceded that she had, in fact, lent her planner to Marissa with the express purpose of helping Marissa hide contraband from her parents, that Wilson proceeded to order the challenged search.

There was also sufficient evidence to support Jordan's and Marissa's veracity. Jordan's tip was substantially corroborated by Defendant Wilson's subsequent investigation of Marissa. *See Phaneuf*, 448 F.3d at 597 (noting that an informant whose information is corroborated by independent investigation tends to be more reliable because "an informant who is right about some facts is more likely to be right about others"). Jordan's primary complaint was that Marissa possessed pills and had distributed at least one of the pills to him. During the ensuing search of Marissa, Wilson did, in fact, find pills on Marissa's person.

Ample facts supported Marissa's veracity as an informant, as well. It is undisputed that school employees had witnessed Redding and Marissa socializing with the same group of friends, and presumably with each other, at the August school dance. Redding also acknowledged

a friendship between Marissa and herself during her interview with Wilson. Finally, and perhaps most significantly, during that same interview, Redding conceded to Wilson that she had lent Marissa her planner to help Marissa conceal contraband from her parents. The girls' friendship and prior interactions made Marissa's accusations against Redding credible, and Wilson acted reasonably in relying upon those accusations in justifying his further investigation, and ultimate search, of Redding.

Finally, we note that there was at least some independent evidence, separate and apart from Jordan's and Marissa's respective tips, that supported Defendants' suspicion that Redding was involved with the pills. Jordan had previously informed Wilson that Redding distributed alcohol to her classmates at her home prior to a school dance in August. As previously discussed, we accept Redding's version of the disputed fact as true and assume, for purposes of this appeal, that Redding did not, in fact, serve alcohol at that party. But the fact that Jordan so informed the school officials was not disputed, and Redding has failed to show that this allegation, "even if untrue, w[as] not made or that [Defendants] could not reasonably believe [it] to be true." *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir.1993). While this allegation, in itself, would not have been enough to justify Defendants' subsequent search of Redding, it was a relevant factor which the school officials were entitled to take into account. *See Phaneuf*, 448 F.3d at 599

("A student's past history of drug use can be a factor adding to the mix in a school official's decision to conduct a strip search.").

Accordingly, we conclude that the district court did not err in holding Defendants' search of Redding's person to be justified at its inception.

2. The Search was Permissible in Scope

Under the *T.L.O.* framework, the search of a student by a public school official must also be permissible in its scope. *See* 469 U.S. at 341-42, 105 S.Ct. 733. A search is permissible in its scope if "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342, 105 S.Ct. 733.

As to scope of search, courts have looked to a number of factors. Many have considered, for example, the importance of the governmental interest at stake. *Compare Cornfield*, 991 F.2d at 1322-23 (upholding strip search aimed at finding drugs); *Williams*, 936 F.2d at 887 (accord), *with Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 605 (6th Cir.2005) (invalidating strip search aimed at finding stolen money and noting that "a search undertaken to find money serves a less weighty governmental interest than a search undertaken for items that pose a threat to the health or safety of students, such as drugs or weapons"). Others have considered the size of the contraband to be found.

See Williams, 936 F.2d at 887 ("Defendants were not unreasonable, in light of the item sought . . . a small vial containing suspected narcotics, . . . in conducting a search so personally intrusive in nature."). Some have also considered the physical setting and circumstances surrounding a search in determining the search's overall reasonableness. *See, e.g., Cornfield*, 991 F.2d at 1323; *Singleton v. Bd. of Educ.*, 894 F.Supp. 386, 391 (D.Kan.1995). We assess each of these factors in turn and conclude that, under the facts of this case, Defendants' search of Redding's person was permissible.

We begin by assessing the importance of the governmental interest at stake: barring the unauthorized use of prescription drugs on school premises. While the inherent risks posed by prescription drugs, particularly ibuprofen, may not be as grave as the risks posed by the illegal substances at issue in some of the other cases, *see, e.g., Cornfield*, 991 F.2d at 1322, it cannot be denied that prescription drugs have the potential to do great harm if misused. Wilson was specifically informed by Schwallier, the school nurse, that the pill in question was available only by prescription and thus had reason to take its potential distribution to other students seriously. Put more broadly, Defendants had a strong interest both in safeguarding students entrusted to their care from the harm posed by the misuse of prescription drugs and in enforcing the school's official policy, which prohibited the use, possession, and distribution of such drugs without permission. In addition, because Defendants had experienced at least one prior incident involving

the misuse of prescription drugs, had recently been told that Jordan had become violent and sick to his stomach after taking pills given to him by a classmate, and were told that other students were planning to take pills together, they had good reason to be extra vigilant in monitoring the drugs' unauthorized use. The first factor, therefore, favors Defendants.

Next, we turn to the size of the contraband to be found. This factor favors Defendants, as well. In *Williams*, the Sixth Circuit held that because school administrators were searching for "a small vial containing suspected narcotics," their "personally intrusive" search of the suspected student's person was not unreasonable. 936 F.2d at 887. Here, Defendants were similarly searching Redding for something small: pills. Moreover, they searched Redding's person only after receiving reliable information that Redding had pills, failing to find the pills in Redding's backpack, and observing that she was wearing clothes without pockets. *Cf. id.* (noting that "[a]fter [the student's] locker and purse were searched, it was reasonable for [the defendant] to suspect the girl may be concealing the contraband on her person"). In light of these factors, we hold that Defendants did not exceed the permissible scope of the search when they asked Redding to remove her clothing and conducted a search of her person.

Finally, we conclude that Defendants administered the search in a reasonable manner. The search of Redding's person was conducted by two employees who were of the same gender as Redding, and the search

took place in the privacy of the school nurse's office with the door securely locked. *Cf. Beard*, 402 F.3d at 606 (noting that "[t]he fact that the search[ ] . . . did not occur in the presence of only school officials, but rather in the presence of other students, . . . supports the conclusion that the search[ ] w[as] unreasonable"). Redding was not physically touched in any way during the search, and she was not asked to remove her bra or underwear. Furthermore, Defendants returned Redding's clothing and permitted her to get dressed as soon as the search was over. *See, e.g., Cornfield*, 991 F.2d at 1323 (upholding a search under similar conditions); *Singleton*, 894 F.Supp. at 391 (accord). Under those facts, we cannot say that Defendants' search of Redding's person exceeded the permissible scope prescribed by the Supreme Court in *T.L.O.*

In a related vein, Redding argues that Defendants' search of her person exceeded its permissible scope because Defendants failed to utilize the least restrictive means possible. Specifically, Redding argues that Defendants did not contact Redding's mother prior to conducting the search or have Redding remove her clothing behind a screen. The Supreme Court has repeatedly held, however, that "reasonableness" under the Fourth Amendment does not require adherence to the least restrictive means. In rejecting a similar argument in *Board of Education v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002), for example, the Court emphasized: "[R]easonableness under the Fourth Amendment does not require employing the least intrusive means, because 'the logic of such elaborate

less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.' " *Id.* at 837, 122 S.Ct. 2559 (quoting *United States v. Martinez-Fuerte,* 428 U.S. 543, 556-57, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)) (internal alteration omitted); *see also Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 663, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."). Because Redding's argument in this respect has already been considered and rejected by the Supreme Court, we decline to credit it here.

III. Conclusion

We conclude that Defendants' warrantless search of Redding's person during school hours and on school premises did not violate Redding's Fourth Amendment rights. Accordingly, we affirm the order of the district court granting summary judgment in favor of Defendants.

AFFIRMED.

Appendix B

THOMAS, Circuit Judge, dissenting:

I must respectfully part company from my friends in the majority. As we have said "[i]t does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity." *Calabretta v. Floyd*, 189 F.3d 808, 819 (9th Cir.1999) (internal quotation marks omitted).

Thirteen-year-old Savana Redding, an honor roll student with no prior disciplinary problems, was required to strip, exposing her breasts and pubic area, in a fruitless search for—at worst—prescription strength ibuprofen.[1] Savana had no history of drug involvement of any type, nor was she alleged to have any connection to illegal drug distribution. Rather, school officials based their actions entirely on uncorroborated statement by a student that Savana had

1. The school makes much of the fact that the ibuprofen tablets were "prescription strength." However, the policy upon which the school relies for justifying the strip search specifically includes over-the-counter medications. There is nothing in the record to indicate that Savana was being strip searched because the ibuprofen was "prescription strength." Rather, the record seems to indicate that school was just searching for generic "pills." The "prescription strength" tablet was 400 mg; the over-the-counter tablets, marketed as Advil or Motrin are 200 mg. In any case, Savana has consistently denied that the pills were hers, and the school does not contend that the pills possessed by the other student were, in fact, Savana's.

given her a few ibuprofen tablets. The school officials did not suspect that the pills were something other than ibuprofen. The nurse recognized the pill immediately as an ibuprofen tablet. At no point did the school officials ask Savana's mother to be present for the search, nor did they permit Savana to call her mother or any other relative during her two and a half hour detention. School officials discovered nothing in the search. Given these circumstances, I would hold that the unwarranted intrusion on Savana's privacy violated the Fourth Amendment.

The majority and I agree that the proper standard for evaluating the constitutionality of the search is dictated by *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). In applying this standard, the majority holds that the strip search of Savana was (1) "justified at its inception" and (2) "reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 U.S. at 341, 105 S.Ct. 733 (citing *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)) (internal quotation marks omitted). I disagree on both counts.

School officials may have had sufficient information to perform some kind of search of Savana for prescription-strength ibuprofen. There is little question that a search of Savana's backpack and her pockets would be constitutionally permissible, given that Savana's friend and classmate Marissa had reported that Savana had provided her with the ibuprofen. But the appropriate inquiry is whether a *strip search* was

justified at its inception. *See, e.g., Phaneuf v. Fraikin,* 448 F.3d 591, 597-600 (2d Cir.2006); *Cornfield v. Consolidated High Sch. Dist.,* 991 F.2d 1316, 1321 (7th Cir.1993).

The only credible connection between Savana and an impending distribution of prescription-strength ibuprofen was Marissa's statement that Savana had provided her with the pills found on her person. However, our sister circuits have concluded—properly in my view-that student tips alone are insufficient to support a constitutionally permissible strip search. *See Phaneuf,* 448 F.3d at 598-99 ("While the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search."); *Williams v. Ellington,* 936 F.2d 881, 888 (6th Cir.1991). To overcome this legal difficulty, the school attempts to additionally justify the search on the basis that (1) Jordan falsely reported that Savana, several months prior, had a party at her home at which alcohol was served; (2) Savana admitted to owning a planner-later discovered to contain cigarettes, lighters, and a knife-that she had given to her friend Marissa.[2] The school

2. As I noted earlier, Savana has consistently denied, both to the school officials, and to the court under penalty of perjury, that she supplied the pills to Marissa. She affirmatively declared that she had never brought prescription pills to school and had never given any pills to any student. She denies that any of the objects found in the planner were hers. She affirmatively alleges that she knows that the objects were owned by Marissa. She denies that alcohol was served at her house, and the school has essentially conceded that this was false accusation.

does not explain how this information sufficiently corroborates and supports a strip search for *pills*. Indeed, the Second Circuit recently held that violation of a school's tobacco policy cannot be the basis of a strip search for another drug. *Phaneuf*, 448 F.3d at 599-600; *see also Cornfield*, 991 F.2d at 1321 (" 'Justified at its inception' in the present context does not mean that a school administrator has the right to search a student who merely acts in a way that creates a reasonable suspicion that the student has violated *some* regulation or law." (emphasis in original)). Under the school's reasoning, it is difficult to see how any student who was identified by Marissa would be safe from a strip search by school officials.

In order to justify such an invasive procedure, school officials must be required to show more than the circumstances presented in this case. *See Cornfield*, 991 F.2d at 1321 ("As the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness."). Strip searches are among the most intrusive searches. The Seventh Circuit has described strip searches as "demeaning," "dehumanizing," and "terrifying." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir.1983). The Tenth Circuit has called them "terrifying." *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir.1993). The Eighth Circuit has called them "humiliating." *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir.1982). Strip searches of children pose special concerns. *Cornfield*, 991 F.2d at 1321 ("no one would seriously dispute that a nude search of a child is traumatic"); *Beard v. Whitmore Lake Sch.*

Dist., 402 F.3d 598, 604 (6th Cir.2005) ("Students of course have a significant privacy interest in their unclothed bodies."). In addition, we must be aware of the fact that the potential for humiliation is particularly acute for a thirteen-year-old girl. *See Calabretta*, 189 F.3d at 819; *Cornfield*, 991 F.2d at 1321 n. 1 ("As children go through puberty, they become more conscious of their bodies and selfconscious about them. Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older."); *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) ("youth . . . is a . . . condition of life when a person may be most susceptible . . . to psychological damage").

Even assuming that the search was justified at its inception, it is clear that the search performed by school officials was not reasonable in scope as secondarily required by *T.L.O.* I again agree with majority that the correct standard is whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.* 469 U.S. at 341-42, 105 S.Ct. 733. I disagree, however, with the assertion that the search of Savana's person was reasonable in scope. It was unreasonable to force Savana, a thirteen-year-old girl, to expose her breasts and pubic area to school officials. It was unreasonable not to call Savana's mother during the two and a half hours she was detained. It was unreasonable, given that officials had no evidence that alternative methods of concealment were employed, to probe further than her backpack and outer pockets.

Appendix B

The school makes much of the fact that Savana was not asked to remove her bra and underwear. School officials asked Savana to pull out her bra band to the side and shake it, which exposed her breasts. They also asked Savana to pull her underwear elastic and shake it and pull out and shake the crotch of her underwear, which exposed her pubic area. Under these circumstances, it is difficult to see how the fact that school officials did not completely undress her is of any constitutional significance. Indeed, perhaps the most alarming aspect of the school's position is that the school officials seem to believe that strip searching of students should be considered a routine matter. Marissa was strip searched for ibuprofen (and nothing was found) prior to the strip search of Savana. When Savana's mother complained about the search the next day, she was told by the principal that there was no problem "because we didn't find anything."

The school also relies on the significant interest school officials have in safeguarding the health of their students and enforcing their anti-drug policy. No one doubts the value of protecting young students from the dangers of illicit drug use. But ibuprofen, aspirin, and acetaminophen do not, shall we say, usually spring immediately to mind when we consider illegal drug trafficking operations in our schools. In any case, the societal interest in discouraging illegal drug use does not obviate our duty to find some meaningful connection to these dangers and the student who is to be deprived of her dignity. To the contrary, *T.L.O.* requires school officials to undertake reasonable, commensurate action

in response. This common sense requirement allows parents to rest assured that their children will not be stripped and searched without their knowledge or participation for allegedly giving another student the equivalent of two Advils.

The conclusion that a strip search of a child may be constitutionally justified on the basis of uncorroborated rumor directly conflicts with the Second Circuit's contrary conclusion in *Phaneuf v. Fraikin*. In *Phaneuf*, the Second Circuit held that the student's Fourth Amendment rights had been violated by an unreasonable search by school officials. School officials had received a student tip that eighteen-year-old Phaneuf planned to hide marijuana "down her pants." 488 F.3d at 593. When confronted by school officials, Phaneuf denied possessing marijuana. *Id.* Officials searched Phaneuf's purse and found cigarettes and a lighter-in violation of school policy. *Id.* at 594. Phaneuf's mother was then called, who conducted a strip search of Phaneuf behind a closed curtain. Even with Phaneuf's mother present, and behind a closed curtain, the Second Circuit found the search to be unreasonable, holding that (1) officials were required to "investigate, corroborate, or otherwise substantiate" the student tip, (2) Phaneuf's non-drug disciplinary history could not support a strip search, (3) "suspicious" denial of possession of contraband also cannot support a strip search, and (4) the connection between tobacco possession and drug possession is far too attenuated to justify a strip search. *Id.* at 597-600. Savana not only had no history of drug abuse, but was an honor student

with no disciplinary trouble whatsoever. In addition, unlike in *Phaneuf*, school officials had no cause to believe that Savana was hiding anything in her clothing. More to the point, the only connection between Savana and an impending pill distribution—aside from Marissa's unsubstantiated tip—was possession of the planner containing cigarettes in violation of school policy.

Certainly, some strip searches have been upheld under circumstances far different from the one at bar. *See, e.g., Cornfield*, 991 F.2d at 1322 (justifying a search where the student, an enrollee in a behavioral disorder program and a drop-out from a drug rehabilitation program, had an unusual "bulge" in the crotch area of his pants, had previously informed officials that he had "crotched" drugs during a police raid, and was known to have possessed drugs while on school grounds); *Williams*, 936 F.2d at 882-83 (justifying a search when officials had (1) statements from other students witnessing the plaintiff actually using the drug, (2) a report from a teacher that the student had written notes about using drugs, (3) received reports from the plaintiff's parent that she was using drugs, (4) a report from a student the day of the search that the plaintiff had drugs on her in a small glass vial.). These cases are quite distinguishable from the case at bar. Indeed, no federal case to examine the question extends official discretion as far as today's holding.

Appendix B

The school's strip search of Savana Redding violated the Fourth Amendment. To hold otherwise would be to conclude that her constitutional rights did, in fact, disappear at the schoolhouse gate. I would reverse the judgment of the district court.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED MARCH 15, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CIV 04-265-TUC-NFF

Savana Redding, a minor by her mother and legal guardian, April Redding,

Plaintiffs,

vs.

Safford Unified School District #1; et al.,

Defendants.

ORDER

Pending before the Court is Defendants' Motion for Summary Judgment. On February 17, 2005, the matter came on for oral argument. For the following reasons, the Court will grant Defendants' Motion.

FACTUAL & PROCEDURAL BACKGROUND

The Magistrate Judge has jurisdiction over this matter by consent of the parties pursuant to 28 U.S.C. § 636(c).

Appendix C

Savana Redding ("Plaintiff"), a minor, by and through her mother and legal guardian, April Redding, originally filed the instant action in Arizona state court and Defendants removed the matter to this Court. Plaintiff asserts claims pursuant to 42 U.S.C. § 1983 and state law. Named Defendants are: (1) Safford Unified School District #1 ("the District"); (2) Kerry Wilson, Vice Principal of Safford Middle School, and Jane Doe Wilson; (3) Helen Romero, administrative assistant at Safford Middle School and John Doe Romero; and (4) Peggy Schwallier, the school nurse at Safford Middle School, and John Doe Schwallier.

Plaintiff's claims arise from an October 8, 2003 incident in which Defendants "subjected [Plaintiff] to a strip search" at Plaintiff's school. (Complaint, p.2)

Defendants have filed the instant Motion for Summary Judgment arguing that they are entitled to qualified immunity.

There is no dispute that at the time of the search, Plaintiff was 13 years old[1] and was an eighth grade student at Safford Middle School ("SMS"). (Defendants' Statement of Facts ("DSOF") p.1; Plaintiff's Statement of Facts ("PSOF"), p.2) Plaintiff attended SMS, where she was on honor roll, for part of her sixth-grade year, all of seventh-grade, and a portion of eighth grade. (PSOF, Ex. A) Prior to the events giving rise to the

---

1. Plaintiff's date of birth is October 20, 1989. (Complaint, p.1)

instant case, Plaintiff had never been disciplined while she attended SMS. (Id.)

It is also undisputed that Safford Middle School's District Policy J-3050, entitled: "Drug and Alcohol Use by Students," strictly prohibits the nonmedical use, possession, or sale of any drug on campus. (DSOF, Ex. 2 internal ex. 3) Specifically, Policy J-3050 prohibits possession of "[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy." (Id.) Additionally, Policy J-5350, entitled: "Administering Medicines to Students," sets forth the requirements that must be met when it is necessary for a student to take medication during school hours. (Id.) These requirements include a written order from a physician, written permission from the parent, and delivery of the medicine to the school office in "the prescription container" or, for over-the-counter drugs, the original container. (Id.)

Additionally, District Policy J-3000 prohibits the possession or use of tobacco products on campus. (Defendants' Reply, Ex. 1)

According to Defendants, SMS "has a history of problems with students using and distributing prohibited and illegal substances on campus." (DSOF, p.2 & Ex. 1, 2) To support this contention, Defendants cite an incident that occurred "a couple of years ago" when a student brought a prescription drug to school and began handing out the pills to several other

students. (Id.) One student who took the drug became seriously ill and was "airlifted to Tucson" where he spent several days in intensive care. (Id.)

Also according to Defendants, SMS held its opening dance for the 2003-2004 school year on August 22, 2003. (DSOF, p.2 & Ex. 1,2) During the dance, several staff members noticed some unusually rowdy behavior from a small group of students including Marissa Glines and Plaintiff. (Id.) The staff members also detected the smell of alcohol among that group. (Id.) Moreover, during the dance, staff found a bottle of alcohol and a package of cigarettes in a receptacle in the girls' bathroom. (Id.)

Later in the school year, on October I, 2003, Jordan Romero,[2] a student and his mother requested a meeting with Robert Beeman, SMS Principal, and Defendant Wilson, SMS Vice-Principal. (DSOF Ex. 1 & 2) At that meeting, Jordan's mother said that a few nights earlier Jordan had become violent with her and he had become sick to his stomach. (Id.) "Jordan then explained that the incident occurred after he had taken some pills that he got from a classmate." (Id.) Jordan told Mr. Beeman and Defendant Wilson that "certain students were bringing drugs and weapons on campus." (Id.) At that point, Defendant Wilson left and Mr. Beeman continued the meeting alone with Jordan and his mother. (Id.) Jordan proceeded to provide "very detailed accounts regarding several students' activities, including Marissa

2. At oral argument, defense counsel stated that Jordan Romero and Defendant Romero are not related.

and [Plaintiff). In [Plaintiff's] case, Jordan said she had hosted a party . . . before the August 22 dance. He also said that [Plaintiff] served alcohol—Jack Daniel's, Black Velvet, vodka, and tequila—at this party, which her mother had bought from Thrifty's Food and Drug." (DSOF, Ex. 1) After the meeting, Mr. Beeman "reviewed Jordan's accounts with Mr. Wilson and told him I would be contacting the parents of the students involved." (Id.; see also DSOF, Ex. 2)

Mr. Beeman states in his affidavit that "[w]ithin a day or two" after learning this information, he contacted all the students' parents. (DSOF, Ex. 1) In Plaintiff's case, her mother indicated that Plaintiff "would not have been involved." (Id.)

On the morning of October 8, 2003, Jordan came to see Defendant Wilson and handed him a white pill. (DSOF, Ex. 2) Jordan told Defendant Wilson that Marissa had just given him the pill at school and that a group of students was planning on taking the pills at lunch. (Id.)

Defendant Wilson took the pill to Defendant Schwallier, the school nurse, and asked her to help him identify it. (Id.) Defendant Schwallier recognized the pill as Ibuprofen 400 mg. (DSOF, Ex. 2, 3) She told Defendant Wilson that the pill could only be obtained with a prescription. (DSOF, Ex. 2, 3)

Defendant Wilson then went to Marissa's class and asked her to gather her things and to come with him.

(DSOF, Ex. 2) When Marissa stood up, Defendant Wilson noticed a black planner in the desk next to her. (Id.) He gave the planner to Kevin Johnson, the teacher in that classroom. (Id.) Mr. Johnson did not know who the planner belonged to but said he would find out. (Id.) Soon thereafter, Mr. Johnson stopped Defendant Wilson to show him the planner's contents. (Id.) The planner contained several knives, several lighters, a cigarette, and a permanent marker. (Id.; DSOF Ex. 2 internal ex. 1)

Defendant Wilson took the planner from Mr. Johnson and escorted Marissa to his office. Defendant Wilson asked Defendant Helen Romero, an administrative assistant, into his office to observe as he requested that Marissa turn out her pockets and open her wallet. (DSOF, Ex. 2 & DSOF, Ex. 4) Marissa produced one blue pill, several white pills, and a razor blade. (Id.; DSOF, Ex. 2 internal ex. 2) "The white pills were identical to the pill that Jordan" gave Defendant Wilson earlier that morning. (DSOF, Ex.1) The blue pill was oblong and had "P445" marked on it. (DSOF, Ex. 3) When Defendant Wilson "asked Marissa where the blue pill came from, Marissa responded, 'I guess it slipped in when she gave me the IBU 400s' . . . [Defendant Wilson] asked 'who is she?' Marissa responded, 'Savana Redding' [Plaintiff]." (DSOF, Ex. 2) Defendant Wilson also questioned Marissa about the planner and its contents. (Id.) Marissa denied knowing anything about them. (Id.)

Defendant Wilson took the blue pill to Defendant Schwallier and asked her to identify it. (Id.) Defendant Schwallier called poison control and learned that the pill was Naprosyn 200 mg, an over-the-counter drug used to treat pain and inflammation. (Id. & DSOF, Ex. 3) Poison control also confirmed that Ibuprofen 400 mg could only be obtained with a prescription. (DSOF, Ex. 3)

Defendant Wilson asked Defendant Romero to take Marissa to the nurse's office to search her clothing for more pills. (DSOF Ex. 2, 4)

Defendant Romero took Marissa to the nurse's office and closed the door, which automatically locked. (DSOF, Ex. 3, 4) Defendant Romero asked Defendant Schwallier to watch as she searched Marissa's clothes for pills. (Id.) Defendant Romero asked Marissa to remove her shoes and socks and Defendant Romero searched them (Id.). Defendant Romero asked Marissa "to lift her shirt and pull her bra band. She did. I asked Marissa to take off her pants and pull the elastic on her underwear. She did. Finally, I looked through her pants." (DSOF, Ex. 4) Defendant Romero did not find any pills during the search. (Id.) "After I finished the search, I immediately returned Marissa's clothes and let her get dressed." (Id.)

That same day after questioning Marissa, Defendant Wilson retrieved Plaintiff from her class. (DSOF, Ex. 2) In his office, Defendant Wilson first discussed with Plaintiff "the importance of telling the truth." (PSOF,

Ex. A) He showed Plaintiff the planner and its contents. "She confirmed that the planner was hers, but that she had lent it to Marissa a couple days earlier." (DSOF, Ex. 2) In her affidavit, Plaintiff states that she let Marissa use the planner because Marissa "had some things she wanted to hide from her parents, specifically cigarettes, a lighter and some jewelry." (PSOF, Ex. A) Plaintiff denied that the contents of the planner were hers. (DSOF, Ex. 2)

Next, Defendant Wilson showed Plaintiff the pills that Marissa and Jordan gave him. (DSOF, Ex. 2) He asked Plaintiff what she could tell him about the pills. (Id.) "She said she knew nothing about them. So, I explained to [Plaintiff] that I had received a report that she had been passing the pills out and asked her if she would mind if we searched her. She said she didn't mind." (Id.) Plaintiff states that Defendant Wilson told her that "he had found the pills in Marissa's things and that someone had said that I was passing out prescription pills at school." (PSOF, Ex. A) Plaintiff told Defendant Wilson that she "had never brought any prescription pills to school and that I had never given any pills to any student at Safford." (Id.) Plaintiff also consented to a search of her belongings. (Id.)

Defendant Wilson asked Defendant Romero to come into his office to help him search Plaintiff's backpack. (DSOF, Ex. 2 & Ex. 4) They found no pills. (Id.) After that search, Defendant Wilson asked Defendant Romero to take Plaintiff to the nurse's office to search her clothes for pills. (Id.)

Appendix C

As she did with Marissa, Defendant Romero took Plaintiff to Defendant Schwallier's office and shut the door behind them. (DSOF, Ex. 4; PSOF Ex. A) The door automatically locked when it was shut. (DSOF, Ex. 4) Defendant Romero asked Defendant Schwallier to watch while she searched Plaintiff's clothing for pills. (Id.) Defendants Romero and Schwallier state that Defendant Romero conducted the search in the same manner that she had searched Marissa's clothing, except that she asked Plaintiff to remove her shirt. (Id.; DSOF, Ex. 3)

Plaintiff describes the search as follows. That day, Plaintiff wore a tee-shirt without a pocket and stretch pants without pockets. (PSOF, Ex. A) Upon arriving at Defendant Schwallier's office, Defendant Romero asked Plaintiff to remove her jacket, socks, and shoes. (Id.) Defendant Schwallier was in the bathroom washing her hands and when she came out, Defendant Schwallier told Plaintiff to remove her pants and shirt. (Id.) "I took off my clothes while they both watched. [Defendant] Romero searched the pants and shirt and found nothing. Then they asked me to pull my bra out and to the side and shake it, exposing my breasts. Then they asked me to pull out my underwear and shake it. They also told me to pull the underwear out at the crotch and shake it exposing my pelvic area." (Id.) Plaintiff "was embarrassed and scared, but I felt I would be in more trouble if I did not do what they asked. I held my head down so that they could not see that I was about to cry." (Id.) Plaintiff further states that "[t]he strip search was the most humiliating experience I have ever had.

Mrs. Romero and Mrs. Schwallier did not look away while I was taking off my clothes. They did nothing to respect my privacy . . . felt offended by the accusations made against me and violated by the strip search." (Id.)

Defendants Romero and Schwallier state that they did not see Plaintiff's "breasts when she pulled her bra band. Nor did [they] see her pubic area when she pulled the elastic on her underwear." (Defendants' Reply, Ex. 2, 3) Defendant Romero found no pills. (DSOF, Ex. 3, 4)

After the search, Defendant Romero immediately returned Plaintiff's clothing to her and let her get dressed. (Id.; PSOF, Ex. A)

Neither Defendant Romero nor Defendant Schwallier touched either Marissa or Plaintiff during the searches. (DSOF, Ex. 3, 4) Further, in both cases, "the search occurred in the privacy of [the nurse's] office with only the student" and Defendants Romero and Schwallier present. (Id.) "And, in both cases, the student never appeared apprehensive or embarrassed during the search." (Id.)

After the search, Plaintiff was taken back to Defendant Wilson's office. (PSOF, Ex. A) After Defendant Wilson was advised that no pills were found, Plaintiff was asked to sit in a chair outside of Defendant Wilson's office, where she remained for two and one-half hours. (Id.) "While I sat in the chair, several individuals came and went from Mr. Wilson's office,

including other students Jordan Romero and Chris Clark." (Id.) After the incident, Chris Clark told Plaintiff that when he was searched "they only asked him to empty his pockets, shake out his shirt and shake his pants up and down. He was not asked to remove any of his clothing." (Id.)

Chris Clark's relevance to the instant action is not developed in the record. Defendant Wilson states that "[n]o one ever identified Chris Clark as possessing or distributing pills." (Defendant's Reply, Ex. 1)

As to the party at Plaintiff's house that occurred the day of the school dance in August 2003, Plaintiff states that she "invited several friends over to my home to hang out before the dance. About five of my friends came. I did not provide any alcohol. My mother did not purchase any alcohol at the Thrifty store. The only beverage served at the gathering was soda . . . Jordan Romero was not at my house the night of the dance. I did not consume, nor did I have possession of, any alcohol at the dance on August 22, 2003." (PSOF, Ex. A) Plaintiff further stated that she is not a friend of Jordan Romero and that Marissa "told me that Jordan Romero gives her his younger brother's Aderall. Jordan and Marissa are part of a group at Safford that get together to smoke, take pills, and steal from nearby stores. I believe Marissa has been arrested and charged with theft." (Id.) Plaintiff denies any knowledge about the students' plan to meet at lunch to take pills on October 8, 2003 that Jordan mentioned to Defendant Wilson. (Id.)

Plaintiff also takes issue with Defendants' characterization that SMS has a history of substance abuse because she was not aware of that history and she does not believe that the school has a reputation of problems with substance abuse. (Id.)

It is undisputed that Defendants did not call Plaintiff's mother prior to the search.

After the incident, Plaintiff left SMS and attended another school for the remainder of the fall semester. (PSOF, p.2)

DISCUSSION

Defendants argue that they are entitled to summary judgment pursuant to the defense of qualified immunity.

Summary Judgment Standard

Pursuant to the Federal Rules of Civil Procedure, a party may seek summary judgment where there is no genuine issue as to any material fact and that party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The initial burden rests on the moving party to point out the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Although reference is made to the movant's "burden," Rule 56 places no evidentiary burden on the moving party beyond that which is required to prevail at trial. Therefore, while the adverse party must offer evidence sufficient to raise a genuine issue of fact on an issue for which that party has the burden of proof, the moving party need provide nothing more than a reference to those materials on file in the case that support the movant's belief that there is an absence of any genuine issue of material fact. *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990). Once satisfied, the burden shifts to the opponent to come forward with "'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)). See also *Celotex*, 477 U.S. at 324 (the opponent must demonstrate through production of probative evidence that an issue of fact remains to be tried.) Indeed, a party opposing summary judgment may not rest on mere allegations or denials in his pleading. Fed. R. Civ. P. 56(e). Nor may the opponent rely upon conclusory or speculative testimony to raise a genuine issue of fact to defeat summary judgment. *Anheuser-Busch, Inc. v. Natural Beverage Distrib.*, 69 F.3d 337, 345 (9th Cir. 1995).

When judging the evidence at the summary judgment stage, a district court is not to make credibility determinations or weigh conflicting evidence but the court is required to view all inferences in the light most favorable to the non-moving party. *Musick*, 913 F.2d at 1394. The ultimate question is whether the evidence "presents a sufficient disagreement to require

submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The mere existence of a scintilla of evidence supporting the non-movant's position will be insufficient; there must be evidence from which the jury could reasonably find for the non-movant. *Anderson*, 477 U.S. at 252. If the factual context makes the non-movant's claim implausible, that party must come forward with more persuasive evidence to support its claim than would otherwise be necessary. *Matsushita*, 475 U.S. 574, 587 (1986).

Whether Defendants are entitled to qualified immunity

"Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' It shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002) (*quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *see also Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular . . . conduct" by government officials.)

Further, "[q]ualified immunity is an entitlement not to stand trial or face the other burdens of litigation."

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). The privilege is "an immunity from suit rather than a mere defense to liability." *Saucier*, 533 U.S. at 200. Therefore, the United States Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Id.* at 201 (citation omitted).

"Resolving the issue of qualified immunity involves a two-step inquiry." *Clement*, 298 F.3d at 903. First, the court must determine "whether '[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right.' . . . A negative answer ends the analysis, with qualified immunity protecting the defendants from liability." *Id. (quoting Saucier*, 533 U.S. at 201). Only in cases where a constitutional violation has occurred will the court proceed to the second step of the analysis to inquire "'whether the right was clearly established.' If the law did not put the [officials] on notice that [their] conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* (*quoting Saucier*, 533 U.S. at 201-202). Moreover, if the government official's mistake as to what the law requires is reasonable, the official is entitled to qualified immunity. *Saucier*, 533 U.S. at 205.

Step one: whether Defendants violated Plaintiff's constitutional rights

The first inquiry under the qualified immunity analysis requires determination of whether Defendants

violated Plaintiff's constitutional rights. Plaintiff claims that Defendants' search violated her rights under the Fourth Amendment. (Plaintiff's Opposition, p.1) Defendants contend that their action did not violate Plaintiff's Fourth Amendment rights and, therefore, the qualified immunity analysis ends in their favor.

The United States Supreme Court has held that the Fourth Amendment applies to searches conducted in public schools by school officials. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In *T.L.O.*, the Supreme Court recognized the need to balance a student's legitimate expectation of privacy against the growing problem of drugs and violence in the public schools and the legitimate need of school officials to take immediate action to maintain order. *Id.* In striking this balance, the Court determined that the search of a student did not require probable cause or a warrant. *Id.* at 340-342; *see also Smith v. McGlothlin*, 119 F.3d 786, 788 (9th Cir. 1997) (relying on *T.L.O.* to affirm district court's application of qualified immunity involving search of student).[3] Instead, the *T.L.O.* Court held that "the legality of a search of a student should depend simply

3. Since *Smith* was decided, the Supreme Court has held that the court must first determine whether a constitutional right was violated before addressing whether the law was clearly established. *See Saucier*, 533 U.S. 194. Although the *Smith* court affirmed the grant of qualified immunity on the ground that the law "was not clearly established that the search was improper," the court also stated: "[w]ere we required to rule whether the search was lawful, there would be authority for concluding it was." *Smith*, 119 F.3d at 788.

on the reasonableness, under all the circumstances, of the search." *Id.* at 341. Whether a search of a student is reasonable under all the circumstances requires a twofold inquiry. *Id.* First, the court "must consider 'whether the . . . [search] was justified at its inception,'"; second, the court "must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* (*quoting Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The Court further explained that "[u]nder ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that a search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-342 (footnotes omitted). In such circumstances, the "search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342.

In articulating the appropriate test, the Supreme "Court expressly left open 'whether individualized suspicion is an essential element of the reasonableness standard.'" *Smith*, 119 F.3d at 788 (*quoting T.L.O.* 469 U.S. at 342 n.8). Indeed, the *T.L.O.* court stated: "We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although 'some quantum of individualized suspicion is usually a

prerequisite to a constitutional search . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.'" T.L.O., 469 U.S. at 342 n.8 (citations omitted) Moreover, since its decision in T.L.O., the Supreme Court has "approved a student search not based on individualized suspicion, *see Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 663-65 . . . (1995) (urinalysis of high school athletes), suggesting that individualized suspicion is not the *sine qua non* of reasonableness in this context." *Smith*, 119 F.3d at 788; *see also Board of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002) (upholding suspicionless urinalysis drug testing of students participating in certain extracurricular activities).

Defendants cite *Vernonia and Earls* for the proposition that reasonable suspicion was not required to search Plaintiff. (Defendants' Motion, p.10) Defendants also state that "there was ample reason to believe that Savana was personally involved." (Id. at p.11)

In contrast, Plaintiff contends that "[a]lthough individualized suspicion may not be required, there must be sufficient indication that [Plaintiff] was distributing drugs to have performed the strip search." (Plaintiff's Opposition, p.11) Plaintiff argues that Defendants lacked sufficient grounds to perform the search.

Appendix C

Justification for the search

The parties dispute whether SMS experienced a problem with drug activity among its students. Defendants contend that SMS "has a history of problems with students using and distributing prohibited and illegal substances on campus." (DSOF, p.l) To support this contention, Defendants point to an incident that occurred "a couple years ago," when a student distributed a prescription drug at school causing another student to become seriously ill. (Id. at pp.1-2). Plaintiff, on the other hand, states that she was unaware of any history of drug abuse at SMS and she denies "that the school has a reputation of problems with substance abuse." (Plaintiff's SOF, Ex. A, p.1) Nonetheless, Plaintiff admits that her friend and classmate, Marissa, was a substance abuser. (Id. at p.5) She also states that Jordan Romero, another SMS student, smokes, takes pills, and distributes his brother's medication to Marissa. (Id.)

If the search at issue had been part of a school-wide program to conduct suspicionless searches of groups of students, like the searches in *Vernonia* or *Earls*, then the existence of a drug problem on the campus would have more significance. *See e.g. B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1268 (9th Cir. 1999) (Relying on *Vernonia* and its progeny to hold that "[i]n the absence of a drug problem or crisis at . . . [the high school], the government's important interest in deterring student drug use would not have been placed in jeopardy by a requirement of individualized

suspicion.") Here, the relevancy of any drug problems among the student body at SMS is consistent with the Supreme Court's general recognition that "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems," thus leading to the conclusion that probable cause and warrants are not necessary to conduct searches at school. T.L.O., 469 U.S. at 339.

"Under ordinary circumstances, the search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *T.L.O.*, 469 U.S. at 341-342 (footnote omitted). It is a violation of school policy to have prescription or nonprescription pills without meeting certain requirements. (*See* DSOF Ex. 2, internal ex. 3) It is undisputed that the pill that Jordan gave Defendant Wilson and the pills that Marissa had in her possession were prescription and nonprescription pills.

Therefore, before Defendant Wilson decided to search Plaintiff for pills, he knew that at least two students, Jordan Romero and Marissa Glines had prescription pills in their possession in violation of school policy. Further, Jordan said he got his pill from Marissa. Additionally, Defendant Wilson knew that Marissa possessed a non-prescription pill also in violation of

school policy. Defendant Wilson also knew that there was a plan to distribute those pills at lunch. Moreover, Marissa linked the pills directly to Plaintiff when she told Defendant Wilson that Plaintiff had given her the pills.

Although Defendant Wilson did not have much information about Marissa's reliability as an informant, he did have additional information corroborating the connection between Marissa and Plaintiff and the likelihood that Plaintiff may be involved in the instant incident. *See United States v. Fernandez-Castillo*, 324 F.3d 1114, 1117 n.3 (9th Cir. 2003) (citing *Florida v. J.L.*, 529 U.S. 266, 268 (2000)) ("[e]ven if unreliable, the tip would still be entitled to some weight under the totality of the circumstances test. But, as the Supreme Court recently emphasized . . . an unreliable tip, *standing alone*, does not give an officer reasonable suspicion")) (emphasis in original).[4] Indeed, Defendant Wilson knew by Plaintiff's own admission that she owned the black planner containing several knives, a cigarette, and lighters that was found at the desk next to Marissa's. Plaintiff stated that she had let Marissa use the planner to hide items, including cigarettes, from Marissa's parents. Based on Plaintiff's statements, Defendant

---

4. At one point in her Motion, Plaintiff states: "M[arissa's] reliability is also questionable and her motive suspicious. [Marissa] was a student caught possessing illegal pills." (Plaintiff's Opposition, p. 12.) Elsewhere Plaintiff states that "[t]he only reliable evidence [against Plaintiff] is the statement by Marissa implicating" her. (Id. at p.14) Later, Plaintiff states that "Marissa's statements are not trustworthy." (Id. at p.15)

Wilson knew that by loaning Marissa the planner to conceal cigarettes, Plaintiff had in fact assisted Marissa in violating the law and school policy regarding the use of tobacco products. *See* A.R.S.§ 13-3622[5]; Defendants' Reply, Ex. 1.

Defendant Wilson also knew that Plaintiff and Marissa had been seen together acting rowdy with some other students at the opening dance. Moreover, he was aware that teachers had noticed the odor of alcohol among that group of students that night. Defendants state that "the rowdy behavior *in combination* with the smell of alcohol did raise a suspicion" that the students had used alcohol. (Defendants' Reply, p. 3) Although teachers discovered alcohol in the girls' bathroom during the dance, that discovery was not directly connected to Plaintiff.

In sum, the connection between Marissa and Plaintiff suggested that the two girls were in fact friendly and had ingested alcohol together. Moreover, their association is reinforced by the fact that Plaintiff permitted Marissa to use Plaintiff's planner to conceal contraband items.

Further, based on the information he received from Jordan Romero, Defendant Wilson had reason to believe that Plaintiff had ingested alcohol and distributed it to students before the dance. As to Plaintiff's argument

5. Pursuant to A.R.S. § 13-3622, a minor in possession of cigarettes is guilty of a petty offense.

that Jordan's statements are inadmissable hearsay, the record is clear that Jordan's statements are not offered to prove the truth of the matter asserted. Instead, Defendants "offer the statement only to prove that Jordan made it . . . that [Defendant] Wilson reasonably believed it was true," that Defendant Wilson knew this information on the date of the search, and acted upon it. (Defendants Reply, p.4); *see also Calmat Co. v. United States Dep't. of Labor,* 364 F.3d 1117, 1124 (9th Cir. 2004) ("If the significance of an out-of-court statement lies in the fact that the statement was made and not in the truth of the matter asserted, then the statement is not hearsay."); *Gibbs v. State Farm,* 544 F.2d 423, 428 (9th Cir. 1976) (upholding admission of letters that otherwise would have been hearsay for the limited purpose of showing that the defendant had received certain information).

The record also supports the finding that Defendant Wilson could reasonably conclude that Jordan was a reliable informant. For example, on October 8, 2003, when Jordan gave the white pill to Defendant Wilson, Jordan stated he had received the pill from Marissa. "[H]is information proved accurate when [Defendant] Wilson found the same type of pills on Marissa." (Defendants' Motion, p. 12)

Plaintiff argues that "[a]lthough individualized suspicion may not be required, there must be sufficient indication that [she] was distributing drugs to have performed the strip search." (Plaintiff's Opposition, p.11) According to Plaintiff, Defendant Wilson did not

have sufficient indication to justify the search. Plaintiff is mistaken. In light of the totality of the information available to Defendant Wilson at the time of the search, as set forth above, there is no question of fact that Defendants had "reasonable grounds for suspecting that the search [would] turn up evidence that [Plaintiff] ha[d] violated or [was] violating either the law or the rules of the school" with regard to possession of drugs. *T.L.O.*, 469 U.S. at 342. Accordingly, the instant search was justified at its inception.

Scope of the search

Under the *T.L.O.* analysis, if the search was justified at its inception, the Court must next determine whether the scope of the search was reasonably related to the circumstances that necessitated the search in the first place. *T.L.O.*, 469 U.S. at 341. "[A] search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342 (footnote omitted). Since the *T.L.O.* decision, courts have also examined the privacy of the environment where the search was conducted, the gender of the person conducting the search, whether the student removed his or her underwear, and whether the student was touched inappropriately. *Cornfield v. Consolidated High School Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993) (upholding search of male student conducted by males in boys' locker room and student was not touched inappropriately); *Williams v. Ellington*, 936 F.2d 881

(6th Cir. 1991) (upholding search of female student performed by females in privacy of administrator's office where it was disputed whether defendant pulled on elastic of student's underwear); *Singleton v. Board of Education USD 500*, 894 F.Supp. 386 (D. Kan. 1995) (search of 13-year-old boy was reasonable in scope because it "was conducted in the privacy of the principal's office with only two male administrators present," the boy was not required to remove his underwear and he was not touched inappropriately). In *Singleton*, the court held that defendants were entitled to qualified immunity where one of the defendants "patted [the 13-year-old student] . . . down in the crotch area" before the defendant unbuttoned and pulled down the boy's "cut-offs," and the defendant also searched inside the waist band of the student's boxer shorts while the boy was wearing them. *Singleton*, 894 F.Supp. at 389.

Plaintiff cites *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980), where the Seventh Circuit held that defendants were not immune from suit regarding the "nude" search of a 13-year-old girl because the search was unreasonable. That case is distinguishable because the facts giving rise to the search resulted from a suspicionless dog sniff program implemented at the school. Moreover, the case predates *T.L.O.*

There is no question of fact that Plaintiff was searched in the presence of two female administrators in the privacy of the nurse's office. No males were present. Plaintiff, like the thirteen-year-old searched in

Singleton, was not required to remove her underwear and she was not touched in any way. Although Plaintiff states that she exposed her breasts and pubic area when she pulled on the elastic of her bra and underwear, Defendants Romero and Schwallier state that they did not see that area of Plaintiff's body. The fact that Defendants were looking for small pills justified the removal of Plaintiff's outer clothing as well as the requirement that Plaintiff pull on the elastic of her undergarments. *See Williams*, 936 F.2d at 883, 887 (where the student was required to strip off her shirt, lower her jeans, and where plaintiff alleged defendants pulled on the elastic of her undergarments "to see if anything would fall out" the defendants "were not unreasonable, in light of the item sought (a small vial containing suspected narcotics), in conducting a search so personally intrusive in nature.")

Plaintiff cites several alternative measures that she contends would have been less intrusive than the search that was actually conducted. (*See* Plaintiff's Opposition, at pp. 12-13) For example, she suggests that she should have been given the opportunity to disrobe behind closed doors or that her mother should have been present. (Id.) Yet, Defendants correctly point out that "the Fourth Amendment does not require employing the least intrusive means." *Earls*, 536 U.S. at 837. (See Defendants' Reply, p. 5) "Instead, the measures need only be '*reasonably* related' to the search's objectives and not 'excessively intrusive.'" (Defendants' Reply, p.6 *quoting T.L.O.*, 469 U.S. at 342) Defendants stress that "[t]he situation was urgent. The staff needed to gather

all the pills before there was an opportunity for any student to take them. And because the pills were so small and easily concealable, trying to conduct the search outside the staff's direct line of sight wouldn't have been effective." (Id.) Given that the objective of the search was to locate small pills, it cannot be said that the search was "excessively intrusive." *T.L.O.*, 469 U.S. at 342; *see Williams*, 936 F.2d at 887 (strip search for small vial of drugs); *Singleton*, 894 F.Supp. at 391 (strip search for drugs and cash). Moreover, '[t]he fact the Plaintiff was quite understandably embarrassed to some degree does not alter the fact that the search was, as discussed above, reasonable in scope, under the circumstances." *Widener v. Frye*, 809 F.Supp. 35, 38 (S.D. Ohio 1992), *aff'd* 12 F.3d 215 (6th Cir. 1993).

Because no genuine issues of material fact are in dispute regarding the reasonableness of the search, the record supports the conclusion that Defendants did not violate Plaintiff's Fourth Amendment rights. The determination that Plaintiff's constitutional rights were not violated "ends the analysis, with qualified immunity protecting the defendants from liability." *Clement*, 298 F.3d at 903. Accordingly, Defendants are entitled to qualified immunity and Defendants' Motion for Summary Judgment will be granted.

Plaintiff's remaining claims

As to Plaintiff's federal claim against the District, Defendants assert that the conclusion that Plaintiff's constitutional rights were not violated eliminates a

necessary element of Plaintiff's claim against the District as well. Defendants are correct and, therefore, the entry of summary judgment shall include the District.

Because Defendants' Motion addressed only Plaintiff's federal claim, Plaintiff's state law negligence claim remains. Whether to retain jurisdiction over the state law claim is a matter within the Court's discretion. 28 U.S.C. 1367(c)(3); *Cook, Perkiss and Liehe, Inc. v. Northern Cal. Collection Serv., Inc.*, 911 F.2d 242, 247 (9th Cir. 1990). When federal claims are dismissed before trial, the Ninth Circuit has held that "the proper exercise of discretion is to dismiss the pendent state claims as well." *Cook*, 911 F.2d at 247. *See also Macri v. King County*, 126 F.3d 1125, 1129-30 (9th Cir. 1997), *cert den.* 118 S.Ct. 1178 (1998), ("a district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it had original jurisdiction.") Accordingly, the Court declines to exercise jurisdiction over the remaining state claim. *Id.*

CONCLUSION

For the foregoing reasons, IT IS ORDERED that Defendants' Motion for Summary Judgment (Doc. NO. 13) is GRANTED in favor of all Defendants named in this action.

IT IS FURTHER ORDERED that Plaintiff's state law claim is DISMISSED WITHOUT PREJUDICE.

Appendix C

DATED this 15 day of March, 2005.

s/ Nancy F. Fiora
NANCY F. FIORA
United States Magistrate Judge

APPENDIX D — PHOTOGRAPH OF REDDING'S PLANNER AND THE CONTRABAND FOUND INSIDE

BEST AVAILABLE COPY

APPENDIX E — PHOTOGRAPH OF THE PRESCRIPTION PILLS AND RAZOR BLADE FOUND ON REDDING'S FRIEND, MARISSA

OPPOSITION BRIEF

No. 08-479

Supreme Court, U.S.
DEC 11 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, *et al.*,

Petitioners,

—v.—

APRIL REDDING, legal guardian of minor child,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

BRUCE G. MACDONALD
MCNAMARA, GOLDSMITH,
JACKSON & MACDONALD, P.C.
1670 E. River Road, Suite 200
Tucson, Arizona 85718
(520) 624-0126

ANDREW J. PETERSEN
HUMPHREY & PETERSON, P.C.
3861 E. Third Street
Tucson, Arizona 85716
(520) 795-1900

DANIEL JOSEPH POCHODA
ACLU OF ARIZONA
P.O. Box 17148
Phoenix, Arizona 85011
(602) 773-6003

ADAM B. WOLF
Counsel of Record
M. ALLEN HOPPER
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
1101 Pacific Avenue, Suite 333
Santa Cruz, California 95060
(831) 471-9000

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

QUESTIONS PRESENTED

1. Whether the court of appeals erred by holding that it is unreasonable and unconstitutional for a school official to strip search a thirteen-year-old girl based on unreliable information that she previously possessed ibuprofen and no information that she possessed ibuprofen underneath her clothing at the time of the search.

2. Whether a school official should have known that this traumatic and unnecessary strip search was unreasonable.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iii
COUNTERSTATEMENT OF THE CASE 1
REASONS FOR DENYING THE PETITION 7
CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Bilbrey ex rel. Bilbrey v. Brown,
738 F.2d 1462 (9th Cir. 1984) ..... *passim*

Brosseau v. Haugen, 543 U.S. 194 (2000) 12

Cornfield v. Consol. High Sch. Dist.,
991 F.2d 1316 (7th Cir. 1993) 10, 13, 14, 16

Doe v. Renfrow,
631 F.2d 91 (7th Cir. 1980) 8, 14, 19

Fewless ex rel. Fewless v. Bd. of Educ.,
208 F. Supp. 2d 806 (W.D. Mich. 2002) 11, 14, 19

Phaneuf v. Fraikin,
448 F.3d 591 (2d Cir. 2006) ..... *passim*

Scott v. Harris, 127 S. Ct. 1769 (2007) 15

Terry v. Ohio, 392 U.S. 1, 20 (1968) 13

Williams ex rel. Williams v. Ellington,
936 F.2d 881 (6th Cir. 1991) 10, 11, 16, 19

Winarto v. Toshiba Am. Elec. Components, Inc.,
274 F.3d 1276, 1283 (9th Cir. 2001) 8

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rule 15, Respondent April Redding hereby submits this brief in opposition to the petition for a writ of certiorari.

COUNTERSTATEMENT OF THE CASE

This case involves a school principal who ordered a strip search of a thirteen-year-old girl based on unreliable information that the girl had possessed ibuprofen at an unspecified time in the past and in an unspecified location. The Ninth Circuit Court of Appeals held that this traumatizing search was unreasonable and, relying on well-established precedent, ruled that the official who ordered the search should have known it was improper and illegal. Because the opinion below neither conflicts with decisions of other circuits nor raises an important question of federal law, the petition for a writ of certiorari should be denied.

1. Savana Redding was a model student at Safford Middle School. She received honors grades and maintained a clean disciplinary record. Pet. App. 117a. In the fall of 2003, Savana was thirteen years old. *Id.*

2. On October 8, 2003, a Safford Middle School student, Jordan, approached the school's assistant principal, Petitioner Kerry Wilson, and explained that he received a white pill earlier that day from a student named Marissa. Pet. App. 7a. Wilson verified with the school's nurse that the pill

was 400 mg ibuprofen. Pet. App. 7a. A 400 mg ibuprofen pill, while considered prescription strength, is equivalent to two over-the-counter 200 mg Advil capsules. Pet. App. 2a. Ibuprofen, like other common pills such as Naprosyn, is used to treat pain and inflammation, as well as to combat the discomfort related to menstrual cramps. Pet. App. 7a, 8a n.4.

Wilson summoned Marissa from class, asked her to gather her belongings, which included a planner, and escorted her to his office. Pet. App. 7a-8a. Marissa disclaimed any knowledge of the planner, even though it was sitting on her classroom desk. Pet. App. 101a-102a. The planner contained small knives, a lighter, and a cigarette. Pet. App. 8a.

With his administrative assistant, Helen Romero, observing, Wilson asked Marissa to turn out her pockets and open her wallet. *Id.* This search yielded several 400 mg ibuprofen pills and a 200 mg Naprosyn pill. *Id.* After being caught with these pills and worried about being disciplined, Marissa "offered up" Savana Redding by alleging that Savana had given her the pills. *Id.* Marissa did not provide any further details regarding Savana—e.g., when and where the alleged provision of pills occurred, whether Savana presently possessed pills, or where (in her purse, in her locker, or on her person) Savana kept such pills—and apparently Wilson did not ask any such follow-up questions. *Id.*

Wilson ordered Romero to escort Marissa to the nurse's office. *Id.* The nurse and Romero asked Marissa to remove her socks and shoes, raise up her shirt, pull out the band of her bra, take off her pants,

and stretch the elastic on her underwear. Pet. App. 8a-9a. These searches revealed nothing. Pet. App. 9a.

3. Acting on Marissa's accusation, Wilson found Savana in her math class, ordered her to pack up her belongings, and instructed her to follow him to his office. Pet. App. 3a. Wilson asked Savana if she recognized the planner and whether its contents belonged to her. *Id.* Savana acknowledged that she had lent the planner to Marissa many days earlier, but told Wilson that it was empty when she lent it and that she had never previously seen the planner's contents. *Id.*

Wilson next directed Savana's attention to the ibuprofen pills he confiscated from Marissa. Pet. App. 4a. Savana replied that she had never seen the pills, had nothing to do with these pills, and had never brought prescription pills to school, let alone provided them to other students. *Id.* Even though Savana's answers were not evasive or otherwise troubling, Wilson asked to search Savana's belongings. *Id.* Wilson, aided by Romero, rummaged through Savana's backpack and found nothing suspicious. *Id.*

When the search of Savana's backpack yielded no evidence of contraband, Wilson did not contact people with relevant information or otherwise attempt to corroborate Marissa's accusation. Instead, Wilson ordered Romero and the school nurse to strip search Savana. Pet. App. 5a. The school officials ordered Savana to remove her shoes and outergarments. *Id.* With Savana seated in only her bra and underwear, Romero and the

school nurse found no pills in Savana's shoes or clothing. *Id.* Romero then instructed Savana to pull her bra to the side and shake it, exposing Savana's breasts to the school officials. *Id.* The shaking did not yield any pills. *Id.* Finally, Romero ordered Savana to pull out her underwear at the crotch and shake it, exposing her pelvic area to the officials. *Id.* This strip search, like the search of Savana's backpack, failed to reveal any pills. *Id.*

4. The strip search of Savana was no ordinary search of a locker, backpack or pencil case.[1] Pet. App. 16a ("Let there be no doubt: the Safford school officials conducted a strip search of Savana."). Such an invasive search of an adolescent girl, as Savana's testimony demonstrates and *amici* verified, has profound, long-lasting consequences.

Savana described the viewing of her naked body by school officials as "the most humiliating experience" of her short life. Pet. App. 5a. Embarrassed and scared, Savana held her head down throughout the strip search "so that they could not see that I was about to cry." Pet. App. 134a.

As set forth by *amici curiae* National Association of Social Workers *et al.* ("NASW") in a brief submitted to the court of appeals, the academic literature demonstrates that Savana's reaction was typical. Pet. App. 30a-31a. NASW's brief

---

[1] Even though Petitioners never once employ the phrase "strip search," this is undoubtedly an apt description of the search. *See* Pet. App. 16a-18a (citing numerous court of appeals opinions, state penal statutes, and Black's Law Dictionary to conclude that this was clearly a strip search).

documented that many young strip-search victims suffer post-search symptoms such as anxiety, depression, and suicidal thoughts. *Id.* A child who is strip searched, NASW reported through the citation of studies, can experience trauma similar in kind and degree to the suffering of sexual-abuse victims.

5. Wilson ordered this traumatic search of Savana based solely on the type of unreliable, blame-shifting allegations that are uttered daily in schools: one student, attempting to get out of trouble, implicates another student for the alleged wrongdoing. Other than the finger pointing by Marissa, no information connected Savana to the ibuprofen. *See* Pet. App. 9a-10a ("[O]n the sole basis of Marissa's attempt to shift the school officials' focus off herself and onto Savana, and without additional questioning or investigation, Wilson directed his assistant . . . to require a thirteen-year-old to disrobe."). Jordan, whose statements to Wilson precipitated the searches of Marissa and then Savana, did not even mention Savana's name. Pet. App. 6a-7a. Marissa, for her part, did not allege that Savana currently possessed any pills, let alone that Savana was secreting pills in her underwear. Pet. App. 8a, 29a. In fact, Marissa did not even claim that Savana gave her pills that day. Even if Savana had prior involvement with ibuprofen—which she did not—based on the information school officials had, the conduct could have taken place days, if not weeks, before.

Wilson never corroborated Marissa's self-serving statement. Pet. App. 10a. He did not follow up with Savana's teachers, search Savana's locker, or

even call Savana's mother, who lived nearby. Finally, Savana's statements to Wilson, unlike Marissa's, completely checked out: Nothing in her backpack or outergarments led to suspicion that this honor-roll student was engaged in any suspicious activity. Pet. App. 22a ("[T]he initial search of Savana revealed nothing to suggest she possessed pills or that she was anything less than truthful when she emphatically stated that she had never brought pills into the school.").

6. Through her mother, Savana filed a complaint against the school district and various school officials for violations of the Fourth Amendment and state law. Pet. App. 10a, 127a. The district court granted Petitioners' motion for summary judgment and a three-judge panel of the court of appeals, over a vigorous dissent, affirmed. Pet. App. 10a-11a. Upon a vote of the majority of its active judges, the court of appeals then ordered rehearing en banc. Pet. App. 12a.

The court of appeals ordered further briefing. Supplementing the parties' briefs before the en banc court, *amici* The Rutherford Institute and NASW filed separate briefs supporting Savana. The Rutherford Institute focused on how this Court's precedent dictated that Marissa was so clearly an unreliable informant that her uncorroborated statement could not form the basis for such an intrusive search. NASW, as discussed above, highlighted for the court the grave consequences of a strip search, especially for an adolescent girl.

Following argument, the en banc court reversed the order granting summary judgment.

Pet. App. 1a-38a. Applying this Court's and court of appeals' precedent, the en banc court held, in a thorough opinion, that the strip search of Savana was neither justified at its inception nor permissible in scope. Pet. App. 12a-33a. The court then affirmed the grant of qualified immunity to the school officials who merely implemented Wilson's strip-search order, but reversed the grant of qualified immunity to Wilson himself. Pet. App. 38a. Wilson's order to strip search thirteen-year-old Savana, the court held, was "patently in defiance" of clearly established law. Pet. App. 35a.

REASONS FOR DENYING THE PETITION

The decision below follows clearly established law in finding that a school official cannot strip search a thirteen-year-old girl based on unreliable information that she might have possessed ibuprofen at an unspecified earlier time and in an unknown location. Review by this Court is unnecessary for three reasons: First, Petitioners do not allege a circuit split, and indeed there is none. Second, neither the parties nor the court of appeals seriously disputes the legal frameworks governing the constitutional inquiry and the qualified-immunity analysis. Far from raising an important question of federal law, Petitioners seek fact-bound error correction, which does not warrant this Court's discretionary review. Third, the court of appeals reached the correct result. Well-established case law dictates that Wilson should not have ordered the strip search of Savana. There is no reason for intervention by this Court.

1. Even Petitioners do not argue that the court of appeals' opinion creates a circuit split. In fact, the opinion is fully consistent with other appellate decisions. Courts of appeals have regularly held unconstitutional a strip search of a student based on an uncorroborated tip that the student possessed a controlled substance. *See, e.g.*, *Phanzuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006); *Bilbrey ex rel. Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984); *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980) (per curiam).[2]

It is uncommon for a school official to strip search a student pursuant to an uncorroborated tip of possession of any drug—let alone ibuprofen. In the small number of cases where this has occurred, however, courts have not hesitated to hold that such searches are unconstitutional. The opinion below does not create a split in authority requiring the attention of this Court.

2. This case does not raise important questions of federal law. The court of appeals and the parties agree on the applicable legal frameworks: *TLO* guides the underlying constitutional inquiry about the reasonableness of the search, and the clearly-established-law standard governs the

---

[2] *Bilbrey* and *Renfrow*, pre-*T.L.O.* cases, are binding post-*T.L.O.* because they employed the reasonable-suspicion test that this Court adopted in *T.L.O.* *See Bilbrey*, 738 F.2d at 1464; *Renfrow*, 631 F.2d at 92 (adopting in relevant part district-court opinion, 475 F. Supp. 1012, 1024-25 (N.D. Ind. 1979), which utilized *T.L.O.*'s reasonable-suspicion analysis). In fact, the *T.L.O.* majority cited *Bilbrey* approvingly, 469 U.S. at 332 n.2, and courts have consistently relied on *Bilbrey* ever since, *see, e.g.*, *Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001).

qualified-immunity analysis. Petitioners' complaint that the court of appeals erroneously applied these standards to the facts of this case does not merit this Court's review; a writ of certiorari is not warranted to correct an alleged misapplication of facts to established law.

a. The court of appeals' opinion is entirely consistent with *T.L.O.* Petitioners admit the court below recognized that *T.L.O.*'s reasonableness standard governs the school search, but then mistakenly claim that that the court applied a probable-cause standard to the strip search. Pet. for Cert. at 23. According to Petitioners, the court's primary error was in balancing the quantum of suspicion that the student has committed an infraction and the seriousness of the infraction that the student allegedly committed against the intrusiveness of the search. However, Petitioners' objection is really to *T.L.O.* itself, which gave content to its reasonableness standard by instructing school officials—and lower courts reviewing the actions of school officials—to consider whether a search is justified at its inception and, if so, whether the scope of the search is "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S. at 342.

That is precisely what the court of appeals did in this case and what numerous other appellate courts have done in applying *T.L.O.*'s balancing test. Pet. App. 13a-33a. In doing so, the court followed not only *T.L.O.* but also an unbroken chain of appellate cases that balance these same factors. *See, e.g.*,

Phaneuf, 448 F.3d 591; *Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316 (7th Cir. 1993); *Williams ex rel. Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991). In none of these cases, including *T.L.O.*, did the courts transform the "reasonable-suspicion" standard into the more stringent "probable-cause" hurdle simply because the respective courts reviewed the factors bearing on the reasonableness of the school search in question. Indeed, assessing factors relevant to whether a search was reasonable at its inception or in its scope is a necessary part of the constitutional analysis.

The National Association of School Boards ("NASB") argues in its *amicus* brief supporting Petitioner that there is confusion in the lower courts because some student searches have been upheld under *T.L.O.* and others have been declared unconstitutional. It is hardly surprising that a fact-based balancing test leads to different results in different cases, *see infra* p.16, but that does not mean that there is a conflict in the circuits on the applicable legal standard. Neither Petitioners nor their *amici* point to a single lower court case that failed to apply *T.L.O.* in reviewing the constitutionality of a student search.

Petitioners likewise fail to raise a substantial federal question regarding the *en banc* court's holding that school officials should corroborate self-serving tips from student-informants before using that information as the sole basis for a consequential strip search. Pet. for Cert. at 25. Numerous opinions recognize that a school official should consider the reliability of a student-informant's tip—

and corroborate such a tip—prior to using it as justification for conducting a strip search. *See, e.g.*, *Phaneuf*, 448 F.3d at 598-99 ("While the uncorroborated tip no doubt justified additional inquiry . . ., we are not convinced that it justified a step as intrusive as a strip search."); *Williams*, 936 F.2d at 888-89 ("[T]here is concern that students will . . . falsely implicate other students in wrongdoing . . . . Because the tip lacks reliability, school officials would be required to further investigate the matter before a search or seizure would be warranted."); *see also Fewless ex rel. Fewless v. Bd. of Educ.*, 208 F. Supp. 2d 806, 817 (W.D. Mich. 2002) (holding that an uncorroborated tip from an informant who may have an ulterior motive in divulging information to a school official cannot by itself support a strip search of a student). By noting that Wilson should have corroborated Marissa's statement inculpating Savana before ordering the strip search, the court below did not adopt a probable-cause test, but instead followed *TLO*'s logic and the well-considered approach employed in other circuits.

b. The lower court's analysis of whether the strip search violated clearly established law likewise does not present a substantial federal question. Rather, the court properly recognized this Court's qualified-immunity jurisprudence and applied the established immunity standard by assessing the facts of this case in light of appellate precedent. Petitioners cannot demonstrate the need for review of the lower court's approach to assessing qualified immunity, and are instead left seeking mere fact-bound error correction by this Court.

The lower court commenced its qualified-immunity analysis by asking whether Savana's right to be free of a strip search in these circumstances was "clearly established at the time of the search." Pet. App. 34a. An action is "clearly established" as unconstitutional, the court correctly stated, if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*; *see also, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 199 (2000) (per curiam) (providing this standard to govern the defense of qualified immunity).

The lower court held that a school official in Wilson's shoes should have known that it was unlawful to order a strip search of Savana. Pet. App. 34a-38a. Petitioners disagree with the lower court's ultimate conclusion, but they do not seek a new or different legal standard to guide the qualified-immunity analysis. They do not ask this Court to craft a new rule that would make schools easier to govern, student strip searches more prevalent, or officials any less liable for damages when they clearly cross the line. This case would not have broad impact on qualified-immunity defenses even if the Court were to adopt Petitioners' argument verbatim. Accordingly, this case does not present an important question of federal law that warrants this Court's review.

3. Applying well-established legal standards to a remarkable set of facts, the court of appeals reached the correct result. It was and should be unconstitutional for a school official to strip search a thirteen-year-old girl, based solely on the unsupported allegations of ibuprofen possession by

another student, especially when the school official knows that the accusing student has reason to shift attention away from her own bad acts. This student-accuser, Marissa, did not allege that Savana actually possessed ibuprofen at the time of the search, let alone that Savana now, or ever, secreted ibuprofen beneath her underwear. Appellate precedent makes it clear that a strip search in these circumstances would be unconstitutional. Common sense and proper practice should have put a quick end to any thought of a traumatic strip search in this setting.

a. In *T.L.O.*, this Court ruled that a school search is reasonable only if it is "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S. at 341 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). While this school-search standard differs from the standard governing searches off school grounds, the benchmark for constitutional searches is the same regardless of location: the government violates the Fourth Amendment if, "under all the circumstances," it conducts an unreasonable search. *Id.*; *see also, e.g.*, *Phaneuf*, 448 F.3d at 595 (noting that *T.L.O.* "appli[es] the Fourth Amendment 'reasonableness' standard to a search of a student by school administrators").

A strip search is a scarring, harrowing event for a thirteen-year-old girl. Pet. App. 30a-31a; *Cornfield*, 991 F.2d at 1321. Some young people subjected to a strip search have even "been moved to attempt suicide." Pet. App. 31a (citation omitted). Accordingly, a school must have reasonable suspicion that a strip search will protect the school from

serious harm before conducting such a consequential search of a child. *See, e.g.*, *Phaneuf*, 448 F.3d at 596; *Cornfield*, 991 F.2d at 1320 (recognizing that a school can undertake such a search only in response to a serious threat of harm); *Bilbrey*, 738 F.2d at 1468 (denying qualified immunity to school officials who strip searched child in pursuit of drugs based solely on an employee-informant's tip). As the Seventh Circuit noted, "[w]hat may constitute reasonable suspicion for a search of . . . a pocket or pocketbook may fall well short of reasonableness for a nude search." *Cornfield*, 991 F.2d at 1321. *Accord Renfrow*, 631 F.2d at 92-93.

In light of these well-established balancing factors, courts have held that strip searches of teenage students are unconstitutional when the searches are ordered pursuant to an uncorroborated statement that the student possesses a controlled substance. *See, e.g.*, *Phaneuf*, 448 F.3d at 598-99; *Bilbrey*, 738 F.2d at 1468; *Renfrow*, 631 F.2d at 91-92; *Fewless*, 208 F. Supp. 2d at 817. Courts have held such searches unconstitutional even where the informant alleges that the student is hiding a substance underneath his or her clothing, *see Phaneuf*, 448 F.3d at 593 (tip that student planned to hide marijuana under her pants that day); such searches are even less reasonable where an official strip searches the student without an allegation that the student is secreting a drug beneath his or her undergarments, *see, e.g.*, *Bilbrey*, 738 F.2d at 1464; *Renfrow*, 631 F.2d at 91-92.

Against this backdrop, it was unreasonable and unconstitutional for Wilson to have ordered the

strip search of Savana. At the time Wilson ordered Savana to disrobe, he had no reliable information that a search of Savana's body would uncover ibuprofen pills. He had received one uncorroborated tip from an unreliable informant—a student who was trying to shift focus away from herself and who had provided a statement that was already contradicted—that Savana had provided her with ibuprofen pills at some unknown time in the past. The student-informant never even alleged that Savana possessed any pills at the time of the search, let alone that she was secreting them beneath her undergarments. This is nowhere near the information upon which a school official can reasonably rely in taking the drastic step of ordering the strip search of a thirteen-year-old girl.

Considering the information, or lack thereof, that Wilson possessed at the time he ordered the strip search, Petitioners and *amicus* NASB miss the mark when they contend that the court's ruling inappropriately second guessed—or failed to defer to—the school official. Armed with such a dearth of information inculpating Savana, and with absolutely no allegation that Savana was hiding pills under her clothing, Wilson's strip search was indefensible under even a generous interpretation of the facts. *But see Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007) (holding that a court must view evidence on summary judgment in the light most favorable to the non-moving party, which in this case is Respondent Redding).

Throughout this litigation, Petitioners have justified the strip search by (1) erroneously claiming

that it was necessary to diffuse a hazardous situation, and (2) relying on cases with meaningfully different facts. As for the purportedly imminent hazard that Savana posed, the court of appeals correctly noted that any danger attendant to her alleged possession of ibuprofen was completely negated once she was sequestered in the principal's office: "Savana had no means at that point to distribute the pills, and whatever immediately threatening activity the school may have perceived . . . had been thwarted." Pet. App. 32a; *see also* Pet App. 29a. In short, strip searching Savana did not protect anyone, while it inflicted serious harm on Savana.

Nor does case law on which Petitioners rely support Wilson's strip search. In *Cornfield*, for example, the Seventh Circuit upheld a strip search of a student after corroborating a student's tip of drug possession by first noticing an "unusual bulge in [the student's] crotch area" and then discovering a police report finding that the student had previously "crotched drugs." 991 F.2d at 1322. Likewise, in *Williams*, the school strip searched a student following an informant's tip alleging the student's drug possession only after the tip had been corroborated through phone calls to the student's father, who confirmed that the student was a habitual drug user, and through the school's finding a note the student wrote acknowledging her drug use. 936 F.2d at 882-83.

Here, in contrast, the school officials did not even attempt to corroborate Marissa's tip. They did not search Savana's locker, speak with her mother,

or talk with anyone who further implicated Savana. Instead, they merely spoke briefly with Savana, who explained—in a manner that did not arouse further suspicion—that she had never before seen such pills and had never given pills to any student. *Compare Phaneuf*, 448 F.3d at 593 (noting that student denied marijuana possession "in a manner that made [the school officials] believe she was lying"), *with* Pet. App. 21a-22a (noting that "there was nothing to suggest" that Savana "was anything less than truthful when she emphatically stated that she had never brought pills into the school"). They then searched Savana's backpack, which likewise contained nothing that bolstered Marissa's accusation. Finding nothing suspicious, Wilson still ordered the strip search of this discipline-free, honors student.

While the school identified some of *Marissa*'s troubling actions, including rules violations, there was no allegation that Savana had joined Marissa in any of this misconduct or that Savana was otherwise connected to illegal pills. *See* Pet. App. 24a-25a (discussing how Marissa's actions do not bear on suspicion that Savana was violating any rule, and, if anything, diminish suspicion of Savana by casting doubt on the credibility of the lone informant who implicated Savana). At the end of the day, Wilson ordered a strip search of Savana based on nothing more than an inherently unreliable informant's tip that Savana had at some unspecified time possessed ibuprofen. There was no allegation that Savana currently possessed ibuprofen, and, significantly, no allegation that Savana was hiding pills beneath her

undergarments at the time of the strip search.[3] Wilson lacked reasonable suspicion that this thirteen-year-old honor-roll student with a clean disciplinary record had adopted drug-smuggling practices associated with international narcotrafficking, or that other middle-school students would willingly consume ibuprofen that was stored in another student's crotch. Wilson's order to strip search Savana was plainly unconstitutional.

b. The strip search of Savana violated her clearly established rights. Accordingly, the court below properly denied qualified immunity to the school official, Wilson, who ordered the search.

Wilson should have had no doubt that the strip search he ordered was unreasonable. Appellate case law, including binding Ninth Circuit precedent, compelled the lower court's holding denying qualified immunity. In *Bilbrey*, the Ninth Circuit held that a school could not strip search one of its students pursuant to an employee-informant's uncorroborated statement that the student possessed drugs in an unspecified place on his person. 738 F.2d at 1468. As in *Bilbrey*, the informant's statement here was non-specific: Marissa did not even allege that Savana currently possessed pills, much less that she possessed them beneath her underwear. Moreover, and as in *Bilbrey*, the school officials here did not corroborate the non-specific tip.

---

[3] Marissa, the only student found hiding pills, kept the pills in her pockets, not in her underwear. Moreover, Savana was not left alone after she was summoned to the principal's office—a time when she otherwise could have transferred pills from her backpack to her underwear.

While this binding precedent forecloses Wilson's qualified-immunity defense, opinions from other circuits, as well as common sense, bolster the lower court's decision. As discussed above, case law holds that a school strip search motivated by an informant's tip violates clearly established constitutional rights when the school official does not corroborate the informant's assertion—even where the informant was far more credible than Marissa. *See, e.g.*, *Williams*, 936 F.2d at 888-89; *Renfrow*, 631 F.2d 91 (holding that strip search based on uncorroborated drug-dog alert was unconstitutional); *Fewless*, 208 F. Supp. 2d at 822-23 (denying qualified immunity in school strip-search case because the school officials did not corroborate informants' statements before conducting the strip search of a student).

These cases do not diminish the importance of eradicating drugs from our schools. Nor do they question whether Wilson "confronted a difficult situation," Pet Br. at 32, or unduly tie Wilson's hands and prevent him from making "on the spot judgments," NASB Br. at 1-2, 9. Surely the school could have conducted some investigation upon receiving Marissa's tip: it could have spoken with Savana's mother; consulted Savana's teachers; perhaps sequestered Savana or asked her mother to take her home; or taken various other actions short of compelling the removal of Savana's clothes and undergarments and peering at her naked body. What it could not have done—and case law makes this abundantly clear—was strip search Savana. They had no corroboration of Marissa's self-serving

statement and no reason to believe that Savana was currently secreting pills beneath her undergarments.

A school official simply cannot order a strip search anytime a frightened student points an accusatory finger at another student. If that were not the case, strip searches would be as prevalent in our schools as the common practice of students tattling on each other. In light of binding case law, not to mention common sense and human decency, Wilson should not have ordered a search that inflicts such profound consequences based on such limited information regarding ibuprofen possession.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Adam B. Wolf
Counsel of Record
M. Allen Hopper
American Civil Liberties
Union Foundation
1101 Pacific Ave., Ste. 333
Santa Cruz, CA 95060
(831) 471-9000

Steven R. Shapiro
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Bruce G. Macdonald
McNamara, Goldsmith,
Jackson & Macdonald, P.C.
1670 E. River Rd., Ste. 200
Tucson, AZ 85718
(520) 624-0126

Andrew J. Petersen
Humphrey & Peterson, P.C.
3861 E. Third St.
Tucson, AZ 85716
(520) 795-1900

Daniel Joseph Pochoda
ACLU of Arizona
P.O. Box 17148
Phoenix, AZ 85011
(602) 773-6003

Dated: December 11, 2008

REPLY BRIEF

115

(4)

Supreme Court, U.S.
FILED
DEC 24 2008
OFFICE OF THE CLERK

No. 08-479

IN THE

Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, *et al.*,

Petitioners,

v.

APRIL REDDING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

MATTHEW W. WRIGHT
Counsel of Record
DAVID K. PAUOLE
HOLM WRIGHT HYDE & HAYS PLC
10429 South 51st Street
Suite 285
Phoenix, AZ 85044
(480) 961-0040

Attorneys for Petitioners

220227

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

PETITIONERS' REPLY BRIEF

In the brief in opposition, the ACLU maintains that the Ninth Circuit merely applied clearly established law to reach a result consistent with other lower courts.

But in reviewing the brief in opposition, the Court may also find it enlightening to review the petition for writ of certiorari that Redding filed less than a year earlier in Docket Number 07-846. Her petition laments that "there is no consistency in court decisions" on this issue and cites a series of commentaries in claiming that "[l]ower courts need better guidance." *Id.* at pp. 15, 18-19. Her petition then advocates for the adoption of probable cause as the proper legal standard for more intrusive searches in the school setting. *Id.* pp. 22-24.

Redding received her wish when the Ninth Circuit subsequently reheard the case en banc and effectively applied probable cause in defiance of this Court's decision in *T.L.O.* Moreover, the Ninth Circuit's denial of qualified immunity to the school administrator certainly did result in a split among the circuit courts on this important federal question.

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *T.L.O.*

In denying that the Ninth Circuit applied probable cause in defiance of *T.L.O.*, the ACLU failed to address or even acknowledge the majority's sliding-scale approach. App. 18a-19a. This approach follows the reasonableness standard of *T.L.O.* for minimally intrusive searches. But for more intrusive searches, as the majority deemed the

search of Redding to be, the approach adjusts to a more heightened standard. Again, although the majority avoided giving a name to this more heightened standard that it applied, that does little to hide the fact that it is probable cause in application.

Likewise, the ACLU failed to acknowledge or address the Ninth Circuit's complete disregard of this Court's direction to defer to school officials' judgment concerning the types of conduct that may threaten student safety and disrupt the school environment:

> The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

New Jersey v. T.L.O., 469 U.S. 325, 342 n.9. (1985). Instead, the Ninth Circuit, with the benefit of hindsight, substituted its own judgment for Wilson's to reach the clearly erroneous conclusion that the abuse of a prescription drug "poses an imminent danger to no one." App. 29a.

II. THE DECISION BELOW HAS RESULTED IN A SPLIT AMONG THE CIRCUIT COURTS ON THE IMPORTANT FEDERAL QUESTION OF QUALIFIED IMMUNITY.

Apparently unable to find a single case on all fours, the Ninth Circuit concluded that Wilson had fair notice that his conduct was unlawful based solely on *T.L.O.* App. 34a-35a. This conclusion is at odds with decisions from both the Sixth and Eleventh Circuits.

In *Williams ex rel. Williams v. Ellington*, the Sixth Circuit upheld a "strip search" of a student for an unknown drug even though she did not look disoriented or intoxicated, prior searches of her locker and purse failed to turn up any evidence of drug use, and she denied possession of any drug. 936 F.2d 881, 883, 887 (6th Cir. 1991). In its analysis, the Sixth Circuit expressed the following concern:

> A diligent but unsuccessful search for additional guidance from the designated jurisdictional pool leads us to a troubling conclusion: the reasonableness standard articulated in *New Jersey v. T.L.O.*, has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. § 1983 cause of action.

Id. at 886.

The Sixth Circuit echoed this concern in *Beard v. Whitmore Lake School District*, which involved a search of an entire school class for missing money in the absence of any individualized suspicion. 402 F.3d 598, 601-02 (6th Cir. 2005). The boys were made to lower their pants and underwear and remove their shirts, and the girls stood in a circle together and pulled up their shirts and pulled down their pants. *Id.* But the Sixth Circuit nevertheless concluded that the school officials were entitled to qualified immunity because *T.L.O.* "is not 'the kind of clear law' necessary to have clearly established the unlawfulness of the defendants' actions in this case." *Id.* at 607.

Nor is the Sixth Circuit alone in this assessment. In *Jenkins ex rel. Hall v. Talladega City Board of Education*, an en banc panel of the Eleventh Circuit considered the search of two eight-year-old girls who were asked to remove their clothes not once but twice after being suspected of taking seven dollars from a classmate's purse. 115 F.3d 821, 822-23 (11th Cir. 1997). On the question of qualified immunity, the Eleventh Circuit noted that "*T.L.O.* did not attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in *T.L.O.*" *Id.* at 828. Accordingly, the Eleventh Circuit concluded that the officials were entitled to qualified immunity because *T.L.O.* was not specific enough to place a reasonable official on notice that the search was unlawful. *Id.* at 824-28.

The Eleventh Circuit reached the same conclusion in *Thomas ex rel. Thomas v. Roberts*, which also involved a search of an entire school class for missing money in the absence of any individualized suspicion. 323 F.3d 950, 951-52 (11th Cir. 2003). The students were taken to their respective bathrooms in small groups, where the boys were

told to drop their pants, while most of the girls were also asked to lift their bras and expose their breasts. *Id.* at 952. Again, the Eleventh Circuit concluded that the school officials were entitled to qualified immunity, stating that "[i]f the salient question is whether *T.L.O.* gave the defendants 'fair warning' that a 'strip search' of an elementary school class for missing money would be unconstitutional, then the answer must be 'no.'" *Id.* at 954.

With this split among the circuit courts on whether *T.L.O.* alone clearly establishes the unlawfulness of searches in other cases with vastly dissimilar facts, further direction from the Court is critical.

CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

MATTHEW W. WRIGHT
Counsel of Record
DAVID K. PAUOLE
HOLM WRIGHT HYDE & HAYS PLC
10429 South 51st Street
Suite 285
Phoenix, AZ 85044
(480) 961-0040

Attorneys for Petitioners

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
NOV 13 2008
OFFICE OF THE CLERK

No. 08-479

IN THE
SUPREME COURT OF THE UNITED STATES

SAFFORD UNIFIED SCHOOL DISTRICT #1; KERRY WILSON, HUSBAND; JANE DOE WILSON, WIFE; HELEN ROMERO, WIFE; JOHN DOE ROMERO, HUSBAND; PEGGY SCHWALLIER, WIFE; JOHN DOE SCHWALLIER, HUSBAND,
Petitioners,

v.

APRIL REDDING, LEGAL GUARDIAN OF MINOR CHILD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF PETITIONERS

Francisco M. Negrón, Jr.
General Counsel
Naomi E. Gittins
Thomas E.M. Hutton
Lisa E. Soronen
National School Boards Ass'n
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722
*Counsel of Record

David R. Day*
Séamus P. Boyce
Church Church
Hittle & Antrim
12514 Reynolds Drive
Fishers, IN 46038
(317) 773-2190

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE NINTH CIRCUIT'S DECISION UNDULY COMPLICATES THE T.L.O. STANDARD AND CONTRAVENES THE STANDARD OF JUDICIAL DEFERENCE TO EDUCATORS ADDRESSING SERIOUS ISSUES OF STUDENT DRUG USE 5

A. The Court should clear up confusion among the federal courts and educators regarding individualized suspicion searches by educators in public schools 5

B. The Court should reiterate the importance of judicial deference to educators attempting to combat student drug use 9

II. THE NINTH CIRCUIT'S DECISION REGARDING QUALIFIED IMMUNITY WILL HAVE A CHILLING EFFECT ON EDUCATORS SEEKING AND RETAINING POSITIONS OF LEADERSHIP IN AMERICA'S SCHOOLS 15

A. Under the law at the time of the search, educators could not have been clear about what standards to apply when making search decisions 15

B. Unless the Court accepts review and further clarifies the "clearly established" standard, educators will fear making tough decisions at risk of being personally liable 9

C. Accepting review in this matter would allow the Court to revisit the analytical framework of *Saucier* or expand upon its forthcoming ruling in *Pearson* 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls, 536 U.S. 822 (2002) 2, 3, 10, 11

Beard v. Whitemore Lake Sch. Dist., 402 F.3d 598 (6th Cir. 2005) 16

Brosseau v. Haugen, 543 U.S. 194 (2004) 16, 23

Callahan v. Millard County, 494 F.3d 89 (10th Cir. 2007), *cert. granted sub nom. Pearson v. Callahan*, 128 S. Ct. 1702 (200) 23

C.B. v. Driscoll, 82 F.3d 383 (11th Cir. 1996) 6, 18

Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) 8, 18, 19

Cuff v. Valley Central Sch. Dist., 559 F. Supp. 2d 415 (S.D.N.Y. 2008) 12

Hope v. Pelzer, 536 U.S. 730 (2002) 16

Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997) 18, 19

Malley v. Briggs,
475 U.S. 335 (1986) 16

Morse v. Frederick,
127 S.Ct. 2618 (2007) 3, 11, 20

New Jersey v. T.L.O.,
469 U.S. 325 (1985) ..... passim

Redding v. Safford Unified Sch. Dist. #1., 531 F.3d 1071 (9th Cir. 2008) 3, 7, 14, 23

Rudebuch v. Hughes,
313 F.3d 506 (9th Cir. 2002) 16

Rudolph ex rel. Williams v. Lowndes County Bd. of Educ.,
242 F. Supp. 2d 1107 (M.D. Ala. 2003) 18, 19

Saucier v. Katz,
533 U.S. 194 (2001) 16, 22, 23

Singleton v. Bd. of Education USD 500,
894 F. Supp. 386 (D. Kan. 1995) 8, 19

Terry v. Ohio,
392 U.S. 1 (1968) 6

Vernonia Sch. Dist., 47 v. Acton,
515 U.S. 646 (1995) 2, 3, 10

Williams v. Ellington,
935 F.2d 881 (6th Cir. 1991) 6, 16, 19

Wilson v. Layne,
526 U.S. 603 (1999) 20

Wood v. Strickland,
420 U.S. 308 (1975) 12

Statutes and Regulations

Cal. Educ. Code § 49050 (2006) 17
Iowa Code Ann. § 808A.2 (2003) 17
N.J. Stat. Ann. § 18A:37-6.1 (1999) 17
Okla. Stat. Ann. § 24-102 (2005) 17
Wash. Rev. Code § 28A.600.230 (2008) 17
Wis. Stat. Ann. § 118.32 (2004) 14

Other Authorities

Del Stover, *Looking for Leaders, Urban districts find that the pool of qualified superintendents is shrinking*, Amer. Sch. Bd. J. (December 2002) 21

Lynn Olson, *Principals Wanted: Apply Just About Anywhere*, Educ. Week (January 2000) 21

National Institute on Drug Abuse, *Prescription and Over-the-Counter Medications* (July 2008) 14

Office of National Drug Control Policy, *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (January 2008) 13

Office of National Drug Control Policy, *Females Bucking Traditional Drug Abuse Trends: Teen Girls, Young Women Now Outpace Male Counterparts for Prescription Drug Abuse, Dependence* (April 2007) 13

Transcript of Oral Argument at 49-50, *Morse*, 127 S. Ct. 2618 20

Transcript of Oral Argument at 23-24, *Pearson*, 128 S. Ct. 1702 23

INTEREST OF *AMICI CURIAE* [1]

Founded in 1940, the National School Boards Association ("NSBA") is a not-for-profit federation of state associations of school boards across the United States. Through its federation NSBA also represents the nation's 95,000 school board members who, in turn, govern nearly 15,000 local school districts that serve more than 49.3 million public school students.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional organization for more than 13,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children.

Amici have a strong interest in ensuring that school leaders have the ability to respond to student drug abuse in an effective manner through educational efforts and appropriate disciplinary measures that may include student searches. *Amici* believe that school officials should be afforded appropriate deference when making on the spot decisions that involve complex legal issues that require the balancing of student privacy rights with a compelling interest in ensuring a safe, orderly drug-free learning environment for all students. The

---

[1] The parties were notified more than ten days before the due date of the *amici's* intent to file. The parties have given written consent to the filing of this brief. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

Ninth Circuit's ruling sharply limits the ability of school leaders to meet this responsibility without risk of personal legal liability.

SUMMARY OF THE ARGUMENT

Over 20 years ago, this Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985), rejected efforts to impose a warrant requirement and probable cause standard on searches by school officials. This Court recognized that the need for efficient school administration undertaken to preserve a safe school environment and to protect students from serious health risks required a more flexible "reasonable suspicion" standard to evaluate the constitutionality of school searches.

Since *T.L.O.*, this Court has reviewed other student search cases. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist., 47J v. Acton*, 515 U.S. 646 (1995). Those cases, however, did not involve searches based on individualized suspicion of a specific student. Contradictions in lower court precedent applying *T.L.O.*, as illustrated by this case, demonstrate the need for this Court to step in and clarify the application of *T.L.O.* to searches, including strip searches, that extend beyond the facts of that case. Otherwise, there is a risk that the lower courts, such as Ninth Circuit's majority here, will develop a jurisprudence that frustrates the ability of educators to effectively address a myriad of student behaviors that create risk for our nation's youth.

In addition, the Ninth Circuit majority opinion represents a sharp departure from recent decisions of this Court that give deference to the educators who administer our nation's schools. This tradition of deference animated the decisions in *T.L.O.*, *Acton*, and *Earls* and most recently was reaffirmed in *Morse v. Frederick*, 127 S. Ct. 2618, 2623 (2007). Deference to educators' judgments recognizes that the role of the courts in school administration should necessarily be limited to avoid placing unwise constraints on the ability of those educators to preserve the learning environment and protect the safety of students.

Rather than paying deference to the judgments of educators here, the Ninth Circuit majority trivialized the dangers posed by the non-medicinal use of prescription and over-the-counter ("OTC") drugs by students. *See Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071, 1085 (9th Cir. 2008) (suggesting that prescription grade ibuprofen does not pose "an imminent danger to" anyone). Recent reports, however, highlight a much more alarming trend with respect to prescription and OTC drug abuse. By accepting review, the Court would have the opportunity to address the legal issues presented here in the context of a growing problem of prescription and OTC drug abuse among young people.

The Ninth Circuit's misunderstanding and misapplication of *T.L.O.* all but pre-determined its erroneous conclusion that the school administrator in this case was not entitled to qualified immunity because the law was clearly established at the time of the search. Not only is this conclusion wrong as a

matter of law, but it also has the undesirable effect of holding school administrators personally liable for making decisions of constitutional import on which experienced jurists cannot agree. This unfairly places school officials in the position of being sued and held personally responsible for good faith decisions intended to protect the health and safety of the students entrusted to their care and tutelage. This outcome demonstrates the critical need for clear guidance from this Court regarding the appropriate balance under the Fourth Amendment between the individual privacy rights accorded a particular student and the compelling interest of schools in maintaining a safe and healthy learning environment for all students.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION UNDULY COMPLICATES THE *T.L.O.* STANDARD AND CONTRAVENES THE STANDARD OF JUDICIAL DEFERENCE TO EDUCATORS ADDRESSING SERIOUS ISSUES OF STUDENT DRUG USE.

A. The Court should clear up confusion among the federal courts and educators regarding individualized suspicion searches by educators in public schools.

In *T.L.O. v. New Jersey,* this Court appropriately recognized that school officials responsible for maintaining safe and orderly learning environments need more flexibility than the probable cause standard generally permits under the Fourth Amendment. In an effort to provide this flexibility, the Court adopted a reasonable suspicion standard that accorded deference to the judgments of school personnel in making disciplinary decisions about students suspected of violating school rules or the law. But instead of easing the constitutional burdens on school leaders, application of the *T.L.O.* standard has led to confusion among judges and educators alike. Accepting review and deciding this case on its merits would give this Court the opportunity to add some much needed clarity to the *T.L.O.* test.

The first part of the *T.L.O.* test requires courts to assess whether the search was justified at its inception. Courts have inconsistently applied this part of the test, resulting in mixed messages to educators who must evaluate information about alleged student misconduct that raises health and safety concerns and determine an appropriate course of action. *Compare Williams v. Ellington*, 935 F.2d 881, 887-89 (6th Cir. 1991) (using the "quantity and quality" stop approach set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), to determine that student informant tips were comparable to anonymous informant tips and must be corroborated) *with C.B. v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996) (ruling that student informants are inherently more reliable than other informants because, if student informants provide inaccurate information, they are subject to discipline themselves). Here, the principal had received relevant information from both students and adults and had knowledge of past incidents of student drug abuse that had resulted in bodily harm and even death. However, in the Ninth Circuit's estimation, the principal did not have sufficient basis for conducting a search of the student's clothes to find the illicit drugs students were reportedly planning to ingest that day.

Another area of confusion arises from the justified-at-inception prong of the *T.L.O.* test as applied to searches involving several different levels of privacy intrusion. Here, for example, the educators were looking for prescription pills, obviously a small item that could easily be concealed. When the pills were not found in the student's book bag, the principal decided to have the girl's clothes

searched by the school nurse. Under the Ninth Circuit's decision, both educators and courts must continuously re-assess the propriety of the search, using the justified-at-inception analysis, whenever the level of intrusion escalates during the search. *Redding*, 531 F.3d at 1081-85. Nothing in *T.L.O.* mandates that a new level of inquiry is required as the search progresses.

Consider the confusion that this progressive search requirement would have on other student searches. For example, what is the proper justified-at-inception standard for a search of a female student where the objective of the search is to turn up evidence that she is selling ecstasy pills to other students on campus? The student has a car, locker, desk, book bag, athletic bag, and a purse. Within the purse are numerous open and zippered pockets. Within the zippered pockets are wallets and smaller zippered bags. Within the book bag is a written journal, MP3 player, cell phone, and digital camera. Within the athletic bag is a toiletries bag. The student herself is wearing three layers of clothing, a hat, socks, and shoes. Imagine how complicated it would be for an educator to follow the Ninth Circuit's progressive search analysis for each level of intrusion.

The second part of the *T.L.O.* test, reasonable-in-scope, has also led to confusing and divergent legal guidance about how to assess the constitutionality of a search. When the objective of the search is to determine whether the student has concealed small items with potential for significant harm, on his or her person, then the search may need to be more intrusive to detect the items. The

lower courts have recognized this practicality in several cases. *See, e.g., Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993)(strip search to find drugs reasonable in scope where educators observed student undress from a distance and did not physically touch the student); *Singleton v. Bd. of Education USD 500*, 894 F. Supp. 386, 388-89, 91 (D. Kan. 1995) (strip search to find stolen $150 reasonable in scope where educators did not require student to remove underwear and performed no body cavity searches). But the Ninth Circuit majority's opinion rejects this approach, calling into question the ability of school officials to make these types of practical searches and hindering the ability of educators to enforce rules that prohibit possession of potentially dangerous, small items, such as drugs.

The *T.L.O.* decision included the nature of the infraction as part of its framework for analyzing the constitutionality of school searches but explicitly declined to preclude searches for certain infractions that some might regard as too "trivial." The federal courts have provided scant guidance to educators regarding the application of this factor. *See, e.g., Cornfield*, 991 F.3d at 1320 (highly intrusive search in response to a minor infraction unreasonable). However, the Ninth Circuit's misapplication of this factor seems directly at odds with what the *T.L.O.* Court had in mind. *T.L.O.*, 469 U.S. at 342 n. 9. Despite this Court's admonition to avoid second-guessing educators about the importance of particular school rules, the Ninth Circuit simply dismissed the importance of the educator's interest here, and that attitude colored the entire decision.

Amici believe that permitting the Ninth Circuit decision to stand will have the practical effect of deterring many student searches and, in particular, searches to detect small items such as prescription drugs. As it stands now in the Ninth Circuit, educators lack the flexibility they need to make on-the-ground judgments to protect student safety. They are subject to judicial second-guessing rather than guided by judicial clarity.

B. The Court should reiterate the importance of judicial deference to educators attempting to combat student drug use.

Amici do not suggest that educators are not subject to judicial oversight. Public schools are governmental entities, and public school educators must comply with the Constitution. The Ninth Circuit, however, neglected to accord school officials the necessary flexibility and deference this Court has deemed appropriate to effectively address the serious problem of student drug abuse. Instead, the Ninth Circuit unwisely substituted its own judgment that the threat of several students ingesting prescription strength drugs did not pose the necessary degree of harm to student health and welfare that would justify searching the student's person and clothing.

The Court first recognized the need for deference to school official's efforts to combat drug abuse in *T.L.O.*, stating that, "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly

ugly forms: drug use and violent crime in the schools have become major social problems." *T.L.O.*, 469 U.S. at 339. Because of this alarming trend, the Court appropriately acknowledged "that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *Id.* at 340.

The Court continued this deferential approach in analyzing the constitutionality of the student drug testing policies at issue in *Acton* and *Earls*. In *Acton*, this Court emphasized the educator's interest in combating student drug use. The Court wrote: "[t]hat the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring drug use by our Nation's school-children is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs." *Acton*, 515 U.S. at 661. The Court explained that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* Discussing further the systemic problem of drug abuse as a rationale for deferring to educators' judgments about how to combat the problem, the Court wrote that "of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.* at 662. In the *Earls* decision, the Court reiterated its view that deference to educators when combating drug abuse is appropriate in deciding the constitutionality of school searches. The Court stated: "[t]he drug abuse problem among our

Nation's youth has hardly abated since [*Acton*] was decided in 1995. In fact, evidence suggests that it has only grown worse." *Earls*, 536 U.S. at 834. The Court explained that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Id.*

The Court most recently reaffirmed the need for deference in *Morse*. While *Morse* did not address the reasonableness of student searches, the Court again noted the critical importance of combating student drug use by stating "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." *Morse*, 127 S. Ct. at 2623. It would indeed be a strange result if the law allows educators to protect students from speech promoting drug use but constrains them from actually attempting to find and confiscate the drugs themselves when there are reasonable grounds to believe drugs are present at school.

By failing to give educators deference in dealing with drug use and substituting its own ideas of what threats are substantial, the Ninth Circuit has created the very atmosphere of the "courtroom as principal's office" that Justice Breyer warned against in his concurring opinion in *Morse*:

> Students will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship

> between teachers and students special. Under these circumstances, the more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office.

Id. at 2640 (Breyer, J., concurring).

The Ninth Circuit's approach also departs markedly from the decisions of other lower courts that have recognized that granting deference to educators not only furthers the goal of student safety but also avoids drawing courts into the daily operations of the school system. For example, in *Cuff v. Valley Central Sch. Dist.*, 559 F.Supp.2d 415 (S.D.N.Y. 2008), the court noted the limited role to be played by courts in student discipline, stating that "[t]he public-school system 'relies necessarily upon the discretion and judgment of school administrators and school board members, and §1983 was not intended to be a vehicle for federal-court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.'" *Id.* at 423 (quoting *Wood v. Strickland*, 420 U.S. 308, 326 (1975)).

Now more than ever, schools are in the forefront of addressing dangers to our youth,

including their growing abuse of prescription drugs. The Office of National Drug Control Policy ("ONDCP") found that in 2006, "more than 2.1 million teens abused prescription drugs." *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (January 2008) ("ONDCP Report"). ONDCP Report at 2. The report states that "more young people ages 12-17 abuse prescription drugs than any illicit drug except marijuana—more than cocaine, heroin, and methamphetamine combined." *Id.* at 1. Even more alarming, 12 to 13-year-olds indicate that prescription drugs are their drug of choice. *Id.* at 2.

The ONDCP identified teen aged girls as having a heightened risk for prescription drug abuse. Office of National Drug Control Policy, *Females Bucking Traditional Drug Abuse Trends: Teen Girls, Young Women Now Outpace Male Counterparts for Prescription Drug Abuse, Dependence* (April 30, 2007). ONDCP reported "that females are at particular risk for prescription drug abuse, with higher rates of abuse among teen girls, more emergency room visits among young women, and higher rates of treatment admissions for dependence on some prescription drugs among females." *Id.*

Further, and contrary to the Ninth Circuit majority's dismissal of any imminent danger, the ONDCP Report states that "[t]here has been a dramatic increase in the number of poisonings and even deaths associated with the abuse of prescription and OTC drugs." *Id.* at 2. The National Institute on Drug Abuse ("NIDA") reports that abuse

of prescription or OTC drugs can have a number of adverse physical and psychological effects including impaired motor function, life-threatening respiratory and heart problems, hostility, paranoia and depression. NIDA, *Prescription and Over-the-Counter Medications*, 2-7 (July 2008); NIDA August 2005 Report at 2-4.

Because the Ninth Circuit did not view prescription strength versions of OTC drugs as any imminent threat, it discounted the educator's interest in preventing the abuse of such drugs in school. *See Redding* at 1086 ("We reject Safford's effort to lump together these run-of-the-mill anti-inflammatory pills with the evocative term 'prescription drugs,' in a knowing effort to shield an imprudent strip search of a young girl behind a larger war against drugs."). Not only is it unwise to exclude certain prescription drugs from discussion of prescription drug abuse, but even OTC drugs are being abused more and more. ONDCP Report at 3. OTC drug abuse is of particular concern "given the easy access teens have to these products." *Id.* On a related issue, teens are increasingly combining the use of both prescription drugs and alcohol with OTC drug use. Unfortunately, these risky combinations "can lead to dangerous consequences, including death." *Id.*

Responsible school administrators are well aware of such national trends in student drug abuse and are in a unique position to understand the substance abuse patterns in their own schools and communities, to take these problems seriously, and to use appropriate measures to respond to student drug abuse on an educational as well as disciplinary

level. But the message the Ninth Circuit's ruling sends is that prescription and OTC drug abuse is not significant enough a problem to warrant immediate intervention by school personnel who have reason to believe that students are planning to ingest drugs neither prescribed by a health care professional nor provided by their parents. While public health authorities are calling for increased awareness of this issue, the Ninth Circuit majority without any basis dismissed the concern as trifling. The Ninth Circuit's refusal to accord appropriate deference to school officials makes the difficult job of protecting students' health and welfare even harder. Review would allow this Court to emphasize the importance of showing deference to educators in such circumstances.

II. THE NINTH CIRCUIT'S DECISION REGARDING QUALIFIED IMMUNITY WILL HAVE A CHILLING EFFECT ON EDUCATORS SEEKING AND RETAINING POSITIONS OF LEADERSHIP IN AMERICA'S SCHOOLS.

A. Under the law at the time of the search, educators could not have been clear about what standards to apply when making search decisions.

Amici recognize that student strip searches are rightly controversial and that reasonable minds will differ about what kinds of exigencies could warrant such a drastic step in the school environment. Educators who must make snap decisions where student safety is concerned,

however, should not be subject to personal liability because of the sensitivity and controversy of a measure. School officials, like the principal here, should not be denied qualified immunity where their actions were neither plainly incompetent nor in knowing violation of clearly established law. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (government officials have qualified immunity unless their actions were plainly incompetent or in knowing violation of clearly established law).

The legal uncertainties surrounding student searches, as described above, should preclude a finding of clearly established law necessary to deny a governmental official the protection of qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Both this Court and the Ninth Circuit have held that, to overcome qualified immunity, the "specific contours of the law" must be well developed or "sufficiently clear that a reasonable official would understand that what he is doing violates [a constitutional] right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citations omitted); *Rudebuch v. Hughes*, 313 F.3d 506, 518 (9th Cir. 2002). This is a standard that "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier*, 533 U.S. at 201).

As noted above, applying *T.L.O.* is not an easy matter for an educator in an ongoing investigation of possible student misconduct. *See Beard v. Whitemore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) (*T.L.O.* is not the kind of clear law necessary to clearly establish unlawfulness of student strip searches); *Ellington*, 936 F.2d at 886

(the *T.L.O.* test "has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to [§1983 liability]"). Prior to this decision, the courts had not provided clear guidance to educators in the Ninth Circuit about the law on student strip searches.[2] *T.L.O.*, the only individualized suspicion student search case decided by this Court, did not involve removal of student clothing, and while it established relevant factors to assess the constitutionality of school searches, it necessarily left application of these factors to the unique circumstances of each case to future courts. There have been few federal court decisions applying *T.L.O.* to strip searches and their results have been conflicting. Absent a declaration from this Court, clear law in the school administrator's own jurisdiction, or consistency among the circuits on strip searches, there can be no real argument that the specific contours of the law on strip searches of students were sufficiently clear so that the principal here should have reasonably known that his actions violated the student's Fourth Amendment rights.

Based on *T.L.O.* and its progeny, it is clear to educators that, before they conduct a search, they must have reasonable suspicion that a search will turn up evidence that the student violated the law or

---

[2] Two states in the Ninth Circuit prohibit strip searches of students by statute. Cal. Educ. Code § 49050 (2006); Wash. Rev. Code § 28A.600.230 (2008). Several states in other circuits have similarly banned strip searches by statute. *E.g.*, Iowa Code Ann. § 808A.2 (2003); N.J. Stat. Ann. § 18A:37-6.1 (1999); Okla. Stat. Ann. § 24-102 (2005); Wisc. Stat. Ann. § 118.32 (2004).

a school rule. It is not clear, however, that it would be unconstitutional to proceed with a search at its inception where the search is based on information obtained from student informants in the context of both school wide and student specific drug and alcohol abuse. *See, e.g.*, *T.L.O.*, 469 U.S. at 337-48 (search justified at inception based on informants indicating student was smoking in the lavatory; second search justified at inception based on finding evidence of violation during first search); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823-28 (11th Cir.)(search justified at inception where second grade student advised educator that someone stole his $7); *Driscoll*, 82 F.3d at 388 (search justified at inception where student informant advised educators that another student was going to sell drugs on campus); *Cornfield*, 991 F.2d at 1321-28 (search justified at inception where student had history of drug related offences and educators observed what appears to be a male student "crotching" drugs); *Rudolph ex rel. Williams v. Lowndes County Bd. of Educ.*, 242 F. Supp. 2d 1107, 1115-17 (M.D. Ala. 2003) (search not clearly unjustified at inception when, after a drug sniffing dog alerted in the library, drugs were found under the table where the student was sitting).

T.L.O. and its progeny also make it clear to educators that a search must be reasonable in scope to find the objectives of the search in light of the age/gender of the student and the nature of the infraction. It is not clear, however, that it would be unconstitutional to perform a strip search of a junior high female student to find prescription pills where: (a) prior to the strip search, educators searched the

student's personal belongings, (b) the strip search was performed by two educators of the same gender as the student, (c) the educators who searched the student never touched the student, and (d) the student was not required to remove her underwear. *See, e.g., T.L.O.*, 469 U.S. at 337-48 (first search reasonable in scope because search of purse reasonable to find evidence of smoking; second search reasonable in scope because further search of purse reasonable to find evidence of possession and distribution of marijuana); *Jenkins*, 115 F.3d at 823-28 (strip search of second graders looking for stolen $7 not clearly unreasonable in scope where students were brought to the restroom to disrobe); *Cornfield*, 991 F.2d at 1321-28 (strip search reasonable in scope where educators suspected student to be "crotching" drugs, educators of the same gender searched by asking the student to remove his clothing and put on gym uniform, and no body cavity searches were performed); *Ellington*, 936 F.2d at 886-89 (strip search not clearly unreasonable in scope where educators trying to locate glass vial of drugs and educators first searched the student's purse and locker); *Rudolph*, 242 F. Supp. 2d at 1115-17 (nude search not clearly unreasonable in scope where educators looking for drugs); *Singleton*, 894 F. Supp at 390-91 (strip search reasonable in scope where search occurred in office with two educators of the same gender and student was not required to remove underwear).

Amici find it difficult to comprehend how the Ninth Circuit could rule that an educator is subject to personal liability for ordering a student search where even the judges reviewing the case cannot

agree on whether the search was legal. Here the federal district court found the search to be constitutional and a Ninth Circuit panel affirmed. It was only on appeal to the Ninth Circuit *en banc* that eight of eleven judges found the search unconstitutional. This Court has already opined that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603 (1999).

Morse provides further instruction on the implications of judicial disagreement for qualified immunity determinations. Not a single justice in *Morse* expressed any doubt that the educator at issue was entitled to qualified immunity. *Morse*, 127 S. Ct. at 2638-43 (Breyer, J., concurring in part and dissenting in part)(arguing that the "Court need not and should not decide this rather difficult *First Amendment* issue on the merits" but "simply hold that qualified immunity bars the student's claim..."); *id.* at 2643 (Stevens, J., dissenting) ("I agree with the Court that the principal should not be held liable...."). Also, during oral argument, Justice Souter—who would have found the educator's actions in that case unconstitutional—suggested that the spirited oral argument about the merits of the case was strong evidence that the educator at issue was entitled to qualified immunity.[3] Chief

---

[3] Transcr. of Oral Argument at 49-50, *Morse*, 127 S. Ct. 2618 ("JUSTICE SOUTER: We've been debating this in this courtroom for going over an hour, and it seems to me however you come out, there is reasonable debate. Should the teacher have known, even in the[] calm deliberative atmosphere of the school later, what the correct answer is?").

Justice Roberts and Justice Kennedy were even more direct in their opinion that the educator was certainly entitled to qualified immunity.[4]

B. Unless the Court accepts review and further clarifies the "clearly established" standard, educators will fear making tough decisions at risk of being personally liable.

Refusing to grant immunity to educators despite the lack of clarity over student search rights will have a harmful impact on the more than 15,000 school districts and 225,000 school administrators across this nation. If allowed to stand, the Ninth Circuit's qualified immunity rationale will create a chilling effect for educators following the approach and would result in fewer searches, particularly if the objective of the search is something other than firearms or more "hard drugs" like cocaine or heroin.

The threat of personal liability may also deter qualified educators from becoming school administrators. Given the current shortage of administrators in many areas of this country, the Ninth Circuit's decision will make it even more difficult to find qualified individuals to fill these positions. Del Stover, *Looking for Leaders, Urban districts find that the pool of qualified superintendents is shrinking*, Amer. Sch. Bd. J. (December 2002) ("there are too few skilled administrators moving up the supply pipeline"); Lynn Olson, *Principals Wanted: Apply Just About Anywhere*, Educ. Week (Jan. 12, 2000) (indicating

---

[4] *Id.* at 29-30.

many teachers are disinterested in becoming administrators because position lacks appeal). Individuals who are taking these positions already do so at great personal sacrifice and should not be burdened with the fear of lawsuits and personal liability simply for carrying out their daily disciplinary duties.

C. Accepting review in this matter would allow the Court to revisit the analytical framework of *Saucier* or expand upon its forthcoming ruling in *Pearson*.

The Court has of late signaled its concern that the analytical framework of *Saucier* may invite judicial pronouncements on constitutional issues that are unnecessary to making qualified immunity determinations. Justice Breyer recently captured this concern as follows:

> I am concerned that the [*Saucier* rule] rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (e.g., qualified immunity) that will satisfactorily resolve the case before the court. Indeed, when courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review.

Brosseau, 543 U.S. at 201-02 (Breyer, J., concurring) (citations omitted).

To address this concern the Court has ordered the parties *sua sponte* to brief and argue the issue of whether *Saucier* should be overruled in a case on its current docket. *Callahan v. Millard County*, 494 F.3d 89 (10th Cir. 2007), *cert. granted sub nom. Pearson v. Callahan*, 128 S. Ct. 1702, 1702-03 (2008) (No. 07-751). During the oral argument in *Pearson*, several Justices raised concerns about *Saucier* that may also be implicated in this case.[5] According to the dissenting opinion written by Judge Hawkins in *Redding*, this case is the "poster case" for revisiting *Saucier*. Even if the Court addresses *Saucier* in *Pearson*, this case may provide an opportunity to expand upon or clarify the ruling in *Pearson* in a unique context that, for the reasons detailed above, is long overdue for more attention from this Court.

CONCLUSION

For the reasons set forth above, *Amici* urge the Court to grant review in this case to rectify the errors made by the Ninth Circuit that seriously undermine school districts' efforts to address student drug abuse in an effective manner and place school

---

[5] Transcr. of Oral Argument at 23-24, *Pearson*, 128 S. Ct. 1702 (No. 751)("JUSTICE BREYER:...As a judge I like to take what is the easier path...And if it's easier to deal with the qualified immunity, deal with it and forget the rest of it....CHIEF JUSTICE ROBERTS: Why isn't it purely an advisory opinion to say whether it's constitutional or not?...I just don't know why the first question isn't purely advisory, because you don't have to know whether it's constitutional or not.").

officials at personal legal risk for taking actions to safeguard the health and welfare of the students entrusted to their care.

Respectfully submitted,

Francisco M. Negrón, Jr.
Naomi E. Gittins
Thomas E.M. Hutton
Lisa E. Soronen
National Sch. Bds. Assoc.
1680 Duke Street
Alexandria, VA 22314
703-838-6722

David R. Day
Counsel of Record
Séamus P. Boyce
Church Church
Hittle & Antrim
12514 Reynolds Dr.
Fishers, IN 46038
317-773-2190

November 13, 2008

JOINT APPENDIX

122

5

No. 08-479

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT # 1; KERRY WILSON, husband; JANE DOE WILSON, wife; HELEN ROMERO, wife; JOHN DOE ROMERO, husband; PEGGY SCHWALLIER, wife; JOHN DOE SCHWALLIER, husband,

Petitioners,

v.

APRIL REDDING, legal guardian of minor child,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

MATTHEW W. WRIGHT
Counsel of Record
DAVID K. PAUOLE
HOLM WRIGHT HYDE & HAYS PLC
10429 South 51st Street
Suite 285
Phoenix, AZ 85044
(480) 961-0040

Attorneys for Petitioners

PETITION FOR CERTIORARI FILED OCTOBER 9, 2008
CERTIORARI GRANTED JANUARY 16, 2009

doc35
HASTOL

4CV1187

06402 9

TABLE OF CONTENTS

Page

Appendix A — Relevant Docket Entries Of The United States District Court For The District Of Arizona, Tucson Division 1a

Appendix B — Affidavit Of Robert Beeman Dated September 30, 2004 ..... 7a

Appendix C — Affidavit Of Kerry Wilson Dated September 30, 2004 ..... 10a

Appendix D — Affidavit Of Peggy Schwallier Dated September 30, 2004 ..... 15a

Appendix E — Affidavit Of Helen Romero Dated September 30, 2004 ..... 18a

Appendix F — Affidavit Of Savana Redding Dated November 3, 2004 ..... 21a

Appendix G — Affidavit Of Kerry Wilson Dated November 23, 2004 ..... 27a

Appendix H — Affidavit Of Peggy Schwallier Dated November 23, 2004 ..... 30a

Appendix I — Affidavit Of Helen Romero Dated November 23, 2004 ..... 31a

The following opinions, and order have been omitted in printing this Joint Appendix because they appear in the Appendix of the Petition for a Writ of Certiorari on the following pages:

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed July 11, 2008 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed September 21, 2007 ..... 98a

Appendix C — Order Of The United States District Court For The District Of Arizona Dated March 15, 2005 ..... 126a

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, TUCSON DIVISION

U.S. District Court
DISTRICT OF ARIZONA (Tucson Division)
CIVIL DOCKET FOR CASE #: 4:04-cv-00265-NFF

Redding v. Safford Unified Scho, et al
Assigned to: Magistrate Judge Nancy F Fiora
Demand: $0
Case in other court: Graham Cty Sup Ct, 2004061
Cause: 42:1983 Civil Rights Act

Date Filed: 05/20/2004
Date Terminated: 03/15/2005
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

April Redding
Savana Redding, a minor by her mother and legal guardian

represented by

Bruce G Macdonald
McNamara Goldsmith Jackson
& Macdonald PC
1670 E River Rd Ste 200
Tucson, AZ 85718
520-624-0126
Fax: 520-624-9238
Email: bmacdonald@mgjmlegal.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Appendix A

V.

Defendant

Safford Unified School District #1
represented by

David Kapena Pauole
Holm Wright Hyde & Hays PLC
10429 S 51st St
Ste 285
Phoenix, AZ 85044-5234
480-477-8590
Fax: 480-961-0818
Email: dpauole@holnwright.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Matthew William Wright
Holm Wright Hyde & Hays PLC
10429 S 51st St
Ste 285
Phoenix, AZ 85044-5234
480-961-0236
Fax: 480-961-0818
Email: mwright@holmwright.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Appendix A

Defendant

***Kerry* Wilson**
husband

represented by

David Kapena Pauole
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Matthew William Wright
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Jane Doe Wilson
wife

represented by

David Kapena Pauole
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Matthew William Wright
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Appendix A

Defendant

Helen Romero
wife

represented by

David Kapena Pauole
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Matthew William Wright
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

John Doe Romero
husband

represented by

David Kapena Pauole
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Matthew William Wright
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Appendix A

Defendant

Peggy Schwallier
wife

represented by

David Kapena Pauole
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Matthew William Wright
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

John Doe Schwallier
husband

represented by

David Kapena Pauole
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Matthew William Wright
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Appendix A

Date Filed	#	Docket Text
		* * *
03/15/2005	24	JUDGMENT by Mag Judge Nancy F. Fiora : re: order filed [23-1]; Dft's Motion for Summary Judgment is GRANTED in favor of all Dfts named in this action. It Is Further Ordered that Pla's state law claim is DISMISSED WITHOUT PREJUDICE. terminating case (cc: all counsel) (REC) (Entered: 03/22/2005)
03/18/2005	23	ORDER by Mag Judge Nancy F. Flora granting motion for summary judgmentby dft Safford Unified Scho, dft Kerry Wilson, dft Jane Doe Wilson, dft Helen Romero, dft John Doe Romero, dft Peggy Schwallier, dft John Doe Schwallier [13-1]; It Is Further Ordered that Pla's state law claim is DISMISSED WITHOUT PREJUDICE. (cc: all counsel) (REC) (Entered: 03/18/2005)
		* * * *

APPENDIX B — AFFIDAVIT OF ROBERT BEEMAN DATED SEPTEMBER 30, 2004

STATE OF ARIZONA)
) ss.
County of Graham)

Robert Beeman, being first duly sworn, deposes and states:

1. I'm the principal of Safford Middle School.

2. The school has a history of problems with students using and distributing prohibited and illegal substances on campus. For example, a couple years ago, a student brought a prescription drug to school and began handing the pills out to several of her classmates. The student wound up in the emergency room after he had an adverse reaction to the drug and became seriously ill. And the situation almost became fatal. As it was, the student was airlifted to Tucson and spent several days in intensive care.

3. The school held its opening dance for the 2003-2004 school year on August 22. During the dance, several staff members noticed some unusually rowdy behavior from a small group of students, including Marissa Glines and Savana Redding, and detected the smell of alcohol among them. And before the dance ended, the staff found a bottle of alcohol and pack of cigarettes in a pad receptacle in the girls' bathroom.

4. On October 1, Jordan Romero, a student, and his mother requested a meeting with Kerry Wilson,

assistant principal, and me. At the meeting, Jordan's mother told us he had become violent with her and gotten sick to his stomach a few nights earlier. Jordan then explained that the incident occurred after he had taken some pills that he got from a classmate. Jordan also advised us that certain students were bringing drugs and weapons on campus.

5. Jordan proceeded to provide very detailed accounts regarding several students' activities, including Marissa and Savana. In Savana's case, Jordan said she had hosted a party at her camper trailer before the August 22 dance. He also said that Savana served alcohol—Jack Daniel's, Black Velvet, vodka, and tequila— at this party, which her mother had bought from Thrifty's Food and Drug.

6. After the meeting, I reviewed Jordan's accounts with Mr. Wilson and told him I would be contacting the parents of the students involved.

7. Within a day or two, I had contacted all the students' parents. In Savana's case, her mom simply dismissed the account by saying that Savana would not have been involved.

8. This affidavit is based on personal knowledge, and I am competent to make the statements contained herein.

Appendix B

FURTHER AFFIANT SAYETH NAUGHT.

s/ Robert Beeman
Robert Beeman

APPENDIX C — AFFIDAVIT OF KERRY WILSON DATED SEPTEMBER 30, 2004

STATE OF ARIZONA)
) ss.
County of Graham)

Kerry Wilson, being duly sworn, deposes and states:

1. I'm the assistant principal of Safford Middle School.

2. The school has a history of problems with students using and distributing prohibited and illegal substances on campus. For example, a couple years ago, a student brought a prescription drug to school and began handing the pills out to several of her classmates. The student wound up in the emergency room after he had an adverse reaction to the drug and became seriously ill. And the situation almost became fatal. As it was, the student was airlifted to Tucson and spent several days in intensive care.

3. The school held its opening dance for the 2003-2004 school year on August 22. During the dance, several staff members noticed some unusually rowdy behavior from a small group of students, including Marissa Glines and Savana Redding, and detected the smell of alcohol among them. Before the dance ended, the staff found a bottle of alcohol and pack of cigarettes in a pad receptacal in the girls' bathroom.

4. On October 1, Jordan Romero, a student, and his mother requested a meeting with Robert Beeman,

principal, and me. At the meeting, Jordan's mother told us he had become violent with her and gotten sick to his stomach a few nights earlier. Jordan then explained that the incident occurred after he had taken some pills that he had got from a classmate. Jordan also advised us that certain students were bringing drugs and weapons on campus. At that point, Mr. Beeman continued the meeting alone with Jordan and his mother.

5. After the meeting, Mr. Beeman and I conferred. According to Mr. Beeman, Jordan provided very detailed accounts regarding several students' activities, including Marissa and Savana. In Savana's case, Jordan said she had hosted a party at her camper trailer before the August 22 dance. He also said that Savana served alcohol—Jack Daniel's, Black Velvet, vodka, and tequila—at this party, which her mother had bought from Thrifty's Food and Drug. Based on Jordan's accounts, Mr. Beeman told me he would be contacting the parents of the students involved.

6. A day or two later, Mr. Beeman told me that he had contacted all the students' parents. In Savana's case, he said her mother simply dismissed the account by saying that Savana would not have been involved.

7. On October 8, Jordan came to see me again as school was ready to start. This time he handed me a white pill. He told me that Marissa had just given him the pill on campus and that a group of students was planning on taking the pills at lunch.

8. I took the pill to Peggy Schwallier, school nurse, and asked her to help me identify it. She recognized the pill as Ibuprofen 400 mg. And she told me it could only be obtained with a prescription.

9. I then went to Marissa's class and had her gather her things and come with me. When she stood up, I noticed a black planner in the desk next to her. I handed the planner to Kevin Johnson, the teacher, and asked if he knew whom it belonged to. He said he didn't, but he would find out. I left the classroom with Marissa and dropped off some materials. But as we walked past the classroom again, Mr. Johnson was standing by the door holding the planner. He motioned me over to look at the planner's contents. It contained several knives, several lighters, a cigarette, and a permanent marker. Attached as exhibit 1 are true and correct pictures of the planner and its contents.

10. I took the planner from Mr. Johnson and escorted Marissa back to my office. I then invited Helen Romero, administrative assistant, into my office to observe as I had Marissa turn out her pockets and open her wallet.

11. As Marissa did so, she produced a blue pill, several white pills, and a razor blade. The white pills were identical to the pill that Jordan had given me that morning. Attached as exhibit 2 is a true and correct picture of the pills and razor blade that Marissa had on her.

12. I asked Marissa where the blue pill came from. Marissa responded, "I guess it slipped in when *she* gave me the IBU 400s." I asked "who is *she*?". Marissa responded "Savanna Redding."

13. Again, I took the blue pill to Ms. Schwallier and asked her to help me identify it. She wasn't sure, so she called poison control. Poison control identified it as Naprosyn 200 mg, an over-the-counter drug used to treat pain and inflammation. Poison control also confirmed that Ibuprofen 400 mg could only be obtained with a prescription.

14. District policy J-3050 strictly prohibits the nonmedical use or possession of *any* drug on campus. And under District policy J-5350, even over-the-counter medications can't be administered to students except under the most controlled conditions. Attached as exhibit 3 are true and correct copies of these policies.

15. I also questioned Marissa about the planner and its contents. She denied knowing anything about them.

16. When I finished questioning Marissa, I asked Ms. Romero to take her to the nurse's office to search her clothing for any more pills.

17. I then went to Savana's class and had her gather her things and come back to my office.

18. I first showed Savana the planner and its contents. She confirmed that the planner was hers, but that she had lent it to Marissa a couple days earlier. She denied knowing anything about the planner's contents.

19. Next, I showed Savana the pills that I had gotten from Jordan and Marissa and asked her what she could tell me about them. She said she knew nothing about them. So I explained to Savana that I had received a report that she had been passing the pills out and asked her if she would mind if we searched her. She said she didn't mind.

20. I invited Ms. Romero into my office to help me search Savana's backpack. After we finished, I asked Ms. Romero to take Savana to the nurse's office to search her clothes for any pills.

21. We did not find any pills during our search of Savana.

22. This affidavit is based on personal knowledge, and I am competent to make the statements contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Kerry Wilson
Kerry Wilson

APPENDIX D — AFFIDAVIT OF PEGGY SCHWALLIER DATED SEPTEMBER 30, 2004

STATE OF ARIZONA)
) ss.
County of Graham)

Peggy Schwallier, being first duly sworn, deposes and states:

1. I work at Safford Middle School and am a registered nurse.

2. On October 8, 2003, Kerry Wilson, assistant principal, asked me to help him identify two pills.

3. I recognized the first pill as Ibuprofen 400 mg. Ibuprofen 200 mg can be purchased over the counter, but Ibuprofen 400 mg can only be obtained with a prescription.

4. The second pill was blue and oblong with an identifying mark of "P445." I called poison control for assistance in identifying it. Poison control told me it was Naprosyn 200 mg, an over-the-counter drug used to treat pain and inflammation.

5. Poison control also confirmed that Ibuprofen 400mg can only be obtained with a prescription.

6. Later that morning, Helen Romero, administrative assistant, came into my office with Marissa Glines, a student. Ms. Romero closed the door behind them, and it automatically locked. Ms. Romero

said that she needed to search Marissa's clothes for any pills and wanted me to be a witness.

7. Ms. Romero asked Marissa to remove her shoes and socks. She did, and Ms. Romero searched them. Ms. Romero asked Marissa to lift her shirt and pull her bra band. She did. Ms. Romero asked Marissa to take off her pants and pull the elastic on her underwear. She did. Finally, Ms. Romero looked through Marissa's pants.

8. Ms. Romero didn't find any pills on Marissa during the search in my presence.

9. After Ms. Romero finished the search, she immediately returned Marissa's clothes and let her get dressed.

10. Ms. Romero returned to my office a second time. This time, Savana Redding, another student, was with her. Again, Ms. Romero closed the door behind them, and it automatically locked. And again, Ms. Romero said that she needed to search Savana's clothes for any pills and wanted me to be a witness.

11. Ms. Romero proceeded with the search of Savana in the same manner that she had searched Marissa earlier. The only difference was that Ms. Romero asked Savana to remove her shirt.

12. Ms. Romero didn't find any pills on Savana during the search in my presence.

Appendix D

13. As before, when Ms. Romero finished the search, she immediately returned Savana's clothes and let her get dressed.

14. In both cases, the search occurred in the privacy of my office with only the student, Ms. Romero, and me present.

15. In both cases, neither Ms. Romero nor me touched the student during the search.

16. And in both cases, the student never appeared apprehensive or embarrassed during the search.

17. This affidavit is based on personal knowledge, and I am competent to make the statements contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Peggy Schwallier
Peggy Schwallier

APPENDIX E — AFFIDAVIT OF HELEN ROMERO DATED SEPTEMBER 30, 2004

STATE OF ARIZONA)
) ss.
County of Graham)

Helen Romero, being first duly sworn, deposes and states:

1. I work at Safford Middle School as an administrative assistant.

2. On October 8, 2003, Kerry Wilson, assistant principal, called me into his office. He was with Marissa Glines, a student, and asked me to observe as he had Marissa turn out her pockets and open her wallet.

3. As Marissa did so, she produced a blue pill, several white pills, and a razor blade.

4. Mr. Wilson asked Marissa where the blue pill came from. Marissa responded, "I guess it slipped in when *she* gave me the IBU 400s." Mr. Wilson asked "who is *she*?" Marissa responded "Savana Redding."

5. There was also a black planner on the table. The planner contained several knives, several lighters, a cigarette, and a permanent marker.

6. When Mr. Wilson finished questioning Marissa, he asked me to take her to the nurse's office to search her clothing for any more pills.

7. I took Marissa to the nurse's office and closed the door behind us. It locked automatically. I then asked Peggy Schwallier, school nurse, to watch as I searched Marissa's clothes for any more pills.

8. I asked Marissa to remove her shoes and socks. She did, and I searched them. I asked Marissa to lift her shirt and pull her bra band. She did. I asked Marissa to take off her pants and pull the elastic on her underwear. She did. Finally, I looked through her pants.

9. I didn't find any more pills on Marissa during the search.

10. After I finished the search, I immediately returned Marissa's clothes and let her get dressed.

11. Later than morning, I returned to Mr. Wilson's office to help him search Savana's backpack. When we finished, he asked me to take her to the nurse's office to search her clothing for any pills.

12. I took Savana to the nurse's office and closed the door behind us. Again, it automatically locked. And again, I asked Ms. Schwallier to watch as I searched Savana's clothes for any pills.

13. I proceeded with the search of Savana in the same manner that I had with Marissa earlier. The only difference was that I asked Savana to remove her shirt.

Appendix E

14. I didn't find any pills on Savana during the search.

15. As before, when I finished the search, I immediately returned Savana's clothes and let her get dressed.

16. In both cases, the search occurred in the privacy of the nurse's office with only the student, Ms. Schwallier, and me present.

17. In both cases, neither Ms. Schwallier nor me touched the student during the search.

18. And in both cases, the student never appeared apprehensive or embarrassed during the search.

19. This affidavit is based on personal knowledge, and I am competent to make the statements contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Helen Romero
Helen Romero

APPENDIX F — AFFIDAVIT OF SAVANA REDDING DATED NOVEMBER 3, 2004

STATE OF ARIZONA)
) ss.
County of Graham)

SAVANA REDDING, being first duly sworn, upon her oath, deposes and states:

1. I make this affidavit of my own personal knowledge.

2. I attended Safford Middle School ("Safford") for a portion of sixth grade, all of seventh grade and a portion of eighth grade. I was an honor roll student.

3. I am not aware of a history of drug abuse at the school nor do I believe that the school has a reputation of problems with substance abuse.

4. Before this incident, I had never been disciplined while I attended Safford.

5. On October 8, 2003 while I was in Math class, vice-principal Kerry Wilson came into class and told me to collect my books and backpack and follow him to his office.

6. Once in his office, Mr. Wilson started discussing the importance of telling the truth. I told him I would tell the truth.

Appendix F

7. While Mr. Wilson was speaking, I noticed my planner on Mr. Wilson's desk. It was open and contained objects that were not mine. It contained several knives, a lighter and a cigarette, none of which were mine.

8. I recognized some of the items as belonging to Marissa Glines, another student at Safford.

9. At Marissa's request I had lent her my planner a couple of days before this incident. She said she had some things she wanted to hide from her parents, specifically cigarettes, a lighter and some jewelry.

10. When asked about the planner I admitted that it was mine, but indicated that none of the objects were mine and told Mr. Wilson that I had lent my planner several days earlier to Marissa.

11. Mr. Wilson then pointed to some pills on his desk. There were four white pills and a blue pill. He asked if I had seen these pills before. I said. no.

12. Then Mr. Wilson told me that he had found the pills in Marissa's things and that someone had said that I was passing out prescription pills at school.

Appendix F

13. I told Mr. Wilson that I had never brought any prescription pills to school and that I had never given any pills to any student at Safford.

14. Mr. Wilson then asked me if I would mind if they searched my stuff.

15. I knew that they would not find anything, so I agreed to the search. Mr. Wilson then called Mrs. Romero into the office.

16. They searched my backpack and found nothing. Then Mr. Wilson told Mrs. Romero to take me to the nurse's office.

17. That day I was wearing stretch pants without pockets and a T-shirt without pockets.

18. I went to the nurse's office. Mrs. Romero asked me to remove my jacket, socks and shoes. The school nurse, Mrs. Schwallier was in the bathroom washing her hands. When the Mrs. Schwalleir came out they told me to remove my pants and shirt.

19. I took off my clothes while they both watched. Mrs. Romero searched the pants and shirt and found nothing.

20. Then they asked me to pull my bra out and to the side and shake it, exposing my breasts. Then they asked me to pull out my underwear and

shake it. They also told me to pull the underwear out at the crotch and shake it, exposing my pelvic area.

21. I was embarrassed and scared, but felt I would be in more trouble if I did not do what they asked. I held my head down so that they could not see that I was about to cry.

22. Then Mrs. Schwallier told me to put my clothes back on and to accompany Mrs. Romero back to the vice-principal's office.

23. Once back at Mr. Wilson's office, after he was advised that nothing was found in my clothes or my person, I was asked to sit in a chair outside of Mr. Wilson's office for approximately 2 1/2 hours.

24. While I sat in the chair, several individuals came and went from Mr. Wilson's office, including other students Jordan Romero and Chris Clark, a policeman, the principal Mr. Beeman and Marissa's dad, Mr. Glines.

25. At one point Mr. Beeman came out and told me he had heard that I stashed Marissa's stuff in my backpack.

26. After the incident, Chris Clark told me that when they searched him, they only asked him to empty his pockets, shake out his shirt and

shake his pants up and down. He was not asked to remove any of his clothing.

27. I was finally allowed to return to class at approximately 12:00 p.m.

28. The strip search was the most humiliating experience I have ever had. Mrs. Romero and Mrs. Schwallier did not look away while I was taking off my clothes. They did nothing to respect my privacy.

29. They could have allowed me to remove my clothes in the bathroom stall, or behind a wall, or at least they could have turned their backs to me, but they did not.

30. I felt offended by the accusations made against me and violated by the strip search.

31. I was not given the opportunity to call my mother or other relative. After school that day my mother learned what happened. She was very upset and called to make an appointment with the Mr. Beeman.

32. My mother and I met with Mr. Beeman in his office. Mr. Beeman indicated that he did not think the strip search was a big deal because they did not find anything.

Appendix F

33. In the course of the meeting, Mr. Beeman raised some events and stories he had heard about me. My mother asked why she had not been called regarding the alleged prior incidents. Mr. Beeman said he could not reach her.

34. On the night of the dance, I invited several friends over to my home to hang out before the dance. About five of my friends came. I did not provide any alcohol. My mother did not purchase any alcohol at the Thrifty store. The only beverage served at the gathering was soda.

35. I am a not friend of Jordan Romero. Jordan Romero was not at my house the night of the dance. I did not consume, nor did I have possession of, any alcohol at the dance on August 22, 2003.

36. Marissa told me that Jordan Romero gives her his younger brother's Aderall. Jordan and Marissa are part of a group at Safford that get together to smoke, take pills and steal from nearby stores. I believe Marissa has been arrested and charged with theft.

37. I know nothing about the plan, referred to in Jordan Romero's affidavit that some students were meeting at lunch to take pills on October 8, 2003.

s/ Savana Redding
Savana Redding

APPENDIX G — AFFIDAVIT OF KERRY WILSON DATED NOVEMBER 23, 2004

STATE OF ARIZONA)
) ss.
County of Graham)

Kerry Wilson, being first duly sworn, deposes and states:

1. I'm the assistant principal of Safford Middle School.

2. No one ever identified Chris Clark as possessing or distributing pills.

3. District policy J-3000 prohibits students from possessing or using tobacco products on school property. Attached is a true and correct copy of the policy.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Kerry Wilson
Kerry Wilson

Appendix G

J-3000 © JICG
TOBACCO USE BY STUDENTS

The possession or use of tobacco products is prohibited in the following locations:

- School grounds.
- School buildings.
- School parking lots.
- School playing fields.
- School buses and other District vehicles.
- Off-campus school-sponsored events.

The Superintendent may establish procedures necessary to implement this policy. Disciplinary penalties for the possession or use of tobacco or similar products may include, but are not limited to, suspension of the student from school or a recommendation for expulsion when there is evidence of repeated and continuous violation of this policy.

Under the provisions of A.R.S. *36-798.03*, a person who violates the prohibition is guilty of committing a petty offense.

Appendix G

Adopted: date of manual adoption

LEGAL REF.: A.R.S. *13-3622*
15-341
36-798.03
20 U.S.C. 6083

CROSS REF.: *GBED* – Smoking by Staff Members
KFAA – Smoking on School Premises at Public Functions

APPENDIX H — AFFIDAVIT OF PEGGY SCHWALLIER DATED NOVEMBER 23, 2004

STATE OF ARIZONA)
) ss.
County of Graham)

Peggy Schwallier, being first duly sworn, deposes and states:

1. I work at Safford Middle School and am a registered nurse.

2. I didn't see Savana's breasts when she pulled her bra band. Nor did I see her pubic area when she pulled the elastic on her underwear.

3. This affidavit is based on personal knowledge, and I am competent to make the statements contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Peggy Schwallier
Peggy Schwallier

APPENDIX I — AFFIDAVIT OF HELEN ROMERO DATED NOVEMBER 23, 2004

STATE OF ARIZONA)
) ss.
County of Graham)

Helen Romero, being first duly sworn, desposes and states:

1. I work at Safford Middle School as an administrative assistant.

2. I didn't see Savana's breasts when she pulled her bra band. Nor did I see her pubic area when she pulled the elastic on her underwear.

3. This affidavit is based on personal knowledge, and I am competent to make the statements contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Helen Romero
Helen Romero

PETITIONER'S BRIEF

122

(6)

No. 08-479

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT # 1; KERRY WILSON, husband; JANE DOE WILSON, wife; HELEN ROMERO, wife; JOHN DOE ROMERO, husband; PEGGY SCHWALLIER, wife; JOHN DOE SCHWALLIER, husband,

Petitioners,

v.

APRIL REDDING, legal guardian of minor child,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

MATTHEW W. WRIGHT
Counsel of Record
DAVID K. PAUOLE
HOLM WRIGHT HYDE & HAYS PLC
10429 South 51st Street
Suite 285
Phoenix, AZ 85044
(480) 961-0040

Attorneys for Petitioners

221311

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BOTH 4CVUAU

QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits public school officials from conducting a search of a student suspected of possessing and distributing a prescription drug on campus in violation of school policy.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public school administrator may be liable in a damages lawsuit under 42 U.S.C. § 1983 for conducting a search of a student suspected of possessing and distributing a prescription drug on campus.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION, STATUTE, AND SCHOOL DISTRICT POLICIES INVOLVED	1
STATEMENT OF THE CASE	4
A. Factual Background	4
B. Procedural History	11
SUMMARY OF ARGUMENT	17
ARGUMENT	19
I. THE SEARCH WAS CONSTITUTIONAL.	19
A. Under *T.L.O.*, the legality of this search depends simply on its reasonableness.	19

Contents

Page

B. The search was justified at its inception. 24

1. The Ninth Circuit applied a "crabbed notion of reasonableness." 25

2. The sliding-scale approach is both contrary to *T.L.O.* and unworkable. 28

C. The search was reasonable in scope. 33

1. The search was not *excessively* intrusive. 34

2. The Ninth Circuit has set a dangerous precedent in substituting its own judgment for that of the school officials. 38

II. THE COURT SHOULD DECIDE THE CONSTITUTIONAL QUESTION. 41

III. THE SCHOOL OFFICIALS ARE CERTAINLY ENTITLED TO QUALIFIED IMMUNITY. 46

CONCLUSION 53

TABLE OF CITED AUTHORITIES

Page

Cases

Anderson v. Creighton, 483 U.S. 635 (1987) 47

Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598 (6th Cir. 2005) 49

Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) 23, 30, 34, 39

Brosseau v. Haugen, 543 U.S. 194 (2004) .. 48, 49, 52

Camara v. Municipal Court, 387 U.S. 523 (1967) 19

C.B. ex rel. Breeding v. Driscoll, 82 F.3d 383 (11th Cir. 1996) 26

Cornfield ex rel. Lewis v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) 29, 44, 50

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 41, 42

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 46

Hope v. Pelzer, 536 U.S. 730 (2002) 49

Cited Authorities

Page

Jenkins ex rel. Hall v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997) 43, 50, 51

Malley v. Briggs, 475 U.S. 335 (1986) 48

Morse v. Frederick, 127 S.Ct. 2618 (2007) . 23, 39, 48

New Jersey v. T.L.O., 469 U.S. 325 (1985) .... *passim*

Pearson v. Callahan, 129 S.Ct. 808 (2009) 41, 42

Phaneuf v. Fraikin, 448 F.3d 591 (2d Cir. 2006) ..29, 44

Saucier v. Katz, 533 U.S. 194 (2001) 41, 42

Singleton v. Board of Educ. USD 500, 894 F. Supp. 386 (D. Kan. 1995) 50

Terry v. Ohio, 392 U.S. 1 (1968) 25

Thomas ex rel. Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *vacated*, 536 U.S. 953 (2002), *reinstated*, 323 F.3d 950 (11th Cir. 2003) 51, 52

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) 23

United States v. Cortez, 449 U.S. 411 (1981) ... 25

United States v. Martinez Fuerte, 428 U.S. 543 (1976) 23, 34

Cited Authorities

Page

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) 22, 23, 33, 34, 38, 39

Williams ex rel. Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991) 43, 50

Wilson v. Layne, 526 U.S. 603 (1999) 48

Constitution and Statutes

U.S. Const. Amend. IV ..... *passim*

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 2, 11

Other Authorities

Office of National Drug Control Policy, *Females Bucking Traditional Drug Abuse Trends: Teen Girls, Young Women Now Outpace Male Counterparts for Prescription Drug Abuse, Dependence* (Apr. 30, 2007) 40

Office of National Drug Control Policy, *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (Jan. 2008) 39, 40, 45

Cited Authorities

	Page
Safford Unified School District Policy J-3050 ..	2
Safford Unified School District Policy J-5350 ..	3

OPINIONS BELOW

The order of the United States District Court for the District of Arizona granting petitioners' motion for summary judgment is reprinted at Pet. App. 126a-54a and is not otherwise published. The Ninth Circuit's original opinion affirming the district court is reprinted at Pet. App. 98a-125a and is published at 504 F.3d 828. The en banc panel's subsequent opinion reversing the district court is reprinted at Pet. App. 1a-97a and is published at 531 F.3d 1071.

JURISDICTION

The Ninth Circuit issued its en banc opinion on July 11, 2008. The petition for a writ of certiorari was filed on October 9, 2008, and was granted on January 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE, AND SCHOOL DISTRICT POLICIES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

Safford Unified School District Policy J-3050 provides:

> The nonmedical use, possession, or sale of drugs on school property or at school events is prohibited. *Nonmedical* is defined as "a purpose other than the prevention, treatment, or cure of an illness or disabling condition" consistent with accepted practices of the medical profession.
>
> Students in violation of the provisions of the above paragraph shall be subject to removal from school property and shall be subject to prosecution in accordance with the provisions of the law.
>
> Students attending school in the District who are in violation of the provisions of this policy shall be subject to disciplinary actions in accordance with the provisions of school rules and/or regulations.

> For purposes of this policy, "drugs" shall include, but not be limited to:
>
> - All dangerous controlled substances prohibited by law.
> - All alcoholic beverages.
> - Any prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy.
> - Hallucinogenic substances.
> - Inhalants.
>
> Any student who violates the above shall be subject to suspension or expulsion, in addition to other civil and criminal prosecution.

Safford Unified School District Policy J-5350 provides, in pertinent part:

> Under certain circumstances, when it is necessary for a student to take medicine during school hours, the District will cooperate with the family physician and the parents if the following requirements are met:
>
> - There must be a written order from the physician stating the name of the medicine, the dosage, and the time it is to be given.

- There must be written permission from the parent to allow the school or the student to administer the medicine. Appropriate forms are available from the school office.

- The medicine must come to the school office in the prescription container or, if it is over-the-counter medication, in the original container with all warnings and directions intact.

STATEMENT OF THE CASE

A. Factual Background

1. Like many public schools, Safford Unified School District (Safford) finds itself on the front lines of a decades-long war against drug abuse among students. As such, Safford has firsthand experience with some of the troubling trends in this area that are by no means unique to its community. First, students have begun to experiment with drugs at a progressively earlier age. So in addition to being vigilant about drug abuse at its two high schools, Safford has also had to be alert to the problem among its younger students at the middle school. Second, the abuse of prescription and over-the-counter (OTC) drugs has become more prevalent because of the relatively easy access to these drugs and a prevailing notion that they provide a "safe" high.

These troubling trends were fully evident as early as 2002 following a near fatality at Safford Middle School. A female student smuggled a prescription drug

onto campus and began passing the pills out to classmates. J.A. 7a, 10a. One boy who took the pills had an adverse reaction and became seriously ill. *Id.* In fact, the circumstances required that he be airlifted about a hundred miles away to Tucson, where he spent the next several days in an intensive care unit. *Id.*

For good reason then, Safford's policies strictly prohibit the nonmedical use or possession of drugs on campus. Pet. App. 128a. The term "drugs" includes, but is not limited to, all alcoholic beverages and any prescription or OTC drug except those for which permission to use in school has been granted. *Id.* Permission requires parental authorization, a physician's order, and delivery of the medication to the school office in either its original or prescription container. *Id.*

2. The 2003-2004 school year arrived with renewed concerns about drug abuse among students at Safford Middle School. At the opening dance, a small group of eighth-grade students, including Marissa Glines and Savana Redding, stood out for more than just their unusually rowdy behavior. J.A. 7a, 10a. The school staff also noticed the distinct stench of alcohol that followed these students around. *Id.* And before the night ended, a bottle of liquor and pack of cigarettes turned up in the trash in the girls' bathroom. *Id.*

Weeks later, school administrators, including Assistant Principal Kerry Wilson, received a call from the mother of another student, Jordan Romero, requesting a meeting. J.A. 7a-8a, 10a-11a. At the meeting, Jordan's mother described how her son had become violent with her a few nights earlier, and then

suddenly sick to his stomach. J.A. 8a, 11a. Jordan explained that his fit of rage occurred after he took some pills that a classmate had given to him. *Id.* He also advised the school administrators that certain students were bringing drugs and weapons onto campus. *Id.*

Jordan identified students by name, including Marissa and Redding, along with detailed accounts of their illicit activities. J.A. 8a, 11a. In Redding's case, he reported that she had served alcohol—Jack Daniel's, Black Velvet, vodka, and tequila—at a party that she hosted in her family's camper trailer before the school dance, the same dance at which the stench of alcohol had followed Redding's group around and at which a bottle of liquor was found in the girls' bathroom. *Id.* Jordan also reported that Redding's mother had purchased the alcohol at Thrifty's Food and Drug. *Id.*

3. Days after the meeting with Jordan and his mother, Wilson received hard evidence that drugs were again being distributed on campus. Jordan sought Wilson out as school was starting and handed him a white pill that Marissa had just given to him. J.A. 11a. He also told Wilson that there were more pills on campus and that a group of students was planning on taking them that day at lunch. *Id.*

Wilson took the pill to Peggy Schwallier, the school nurse, for help in identifying it. J.A. 12a, 15a. She recognized the pill as Ibuprofen 400 mg, which could only be obtained with a prescription. *Id.*

Wilson then went to Marissa's class and asked her to gather her things and come with him. J.A. 12a.

As she stood up, he noticed a black planner in the otherwise empty desk next to her and asked the classroom teacher to identify its owner. *Id.* The teacher discovered several knives and lighters, a cigarette, and a permanent black marker inside the planner, and turned them over to Wilson. Pet. App. 155a; J.A. 12a.

Wilson took the planner and its contents and escorted Marissa to his office, where he invited Helen Romero, an administrative assistant, to observe as Marissa turned out her pockets and opened her wallet. J.A. 12a, 18a. As Marissa did so, she pulled out a blue pill (later discovered to be Naprosyn 200 mg), several white pills identical to the one that Jordan had turned in to Wilson, and a razor blade. Pet. App. 156a; J.A. 12a-13a, 15a, 18a.

Wilson asked Marissa where the blue pill came from. J.A. 13a, 18a. She responded, "I guess it slipped in when *she* gave me the IBU 400s."[1] *Id.* Wilson asked "who is *she*?" to which Marissa responded, "***Savana Redding***." *Id.*

Marissa denied any knowledge of the planner or its contents. J.A. 13a. So Wilson asked Romero to take

---

[1] Redding has made reference to the fact that ibuprofen and naprosyn are commonly used to treat menstrual cramps. But at the risk of stating the obvious, Jordan was not given a pill to relieve menstrual cramps. And by referring to the white pills as "IBU 400s" instead of simply as ibuprofen, Marissa displayed her ignorance of exactly what the pills were, let alone of what legitimate medical purpose they might serve.

Marissa to the nurse's office to search her clothing for any more pills while he went to find Redding. J.A. 13a, 18a.

Wilson found Redding in class and had her gather her things and come back to his office. J.A. 13a, 21a. There, he showed her the planner, its contents, and the pills that he had gotten from Jordan and Marissa. J.A. 14a, 22a. Redding admitted that the planner was hers and that she had lent it to Marissa several days earlier, while denying that the contents were hers.[2] *Id.* She also denied that she had ever seen the pills before. J.A. 14a, 22a-23a.

Wilson explained to Redding that he had received a report that she had been passing the pills out at school, which she denied. J.A. 14a, 22a-23a. He then obtained her consent to search her backpack, which did not contain any pills. J.A. 14a, 19a, 23a. Redding's clothes did not have any pockets to check. J.A. 23a.

4. At that point, Wilson had a decision to make. He confirmed that prescription pills were being distributed

---

[2] Redding admits that she lent her planner to Marissa because she wanted to hide cigarettes, a lighter, and jewelry in it. J.A. 22a. Redding also admits that she recognized some of the contents found in the planner as belonging to Marissa. *Id.* Despite assisting Marissa to conceal such contraband as cigarettes and lighters, Redding touts her discipline-free record. Accordingly, her assertion should not be misread to infer that she never broke school rules, only that she was never caught. Moreover, the assertion is of limited probative value given the strong indications that she had recently served alcohol to classmates before the school dance.

again on campus that morning, although he still was not sure who else had pills and in what amounts, or for that matter, whether there were also other kinds of pills on campus.[3] Marissa directly implicated Redding as the supplier of the prescription pills, plus another OTC pill, based on personal knowledge as she claimed to have received the pills from her. And Wilson already had a strong basis for suspecting Redding of providing alcohol to students, including Marissa, before the school dance.

Marissa's implication of Redding certainly struck Wilson as reliable. He had not offered Marissa leniency in exchange for information, nor did he attempt to pressure her into naming anyone. He simply asked her where—not who—the blue pill came from. And Marissa's reluctant response could hardly be described as exculpatory because it in no way reduced her own guilt. Even if she did get the pills from Redding, she was still caught with them in her possession and had distributed at least one herself to Jordan. Furthermore, the girls' obvious friendship suggested that they would be knowledgeable about each other's activities and certainly guarded against an ulterior motive for implicating Redding.

As for Redding's denials, one possibility was that they were true, although she did not offer any reason why her friend would falsely accuse her. Of course, the other possibility was that her denials were merely self-

---

[3] With Marissa's report that the blue pill must have inadvertently "slipped in" when Redding gave her the white pills, it was still an open question as to what other kinds of pills Redding may have had that she withheld from Marissa.

serving as she sought to avoid responsibility and probable discipline.

Also notable was Redding's admission that the planner was hers and that she had lent it to Marissa a few days earlier. This admission further linked the two as friends and raised a concern that Redding was involved with Marissa in bringing the planner's contents—knives and lighters, a cigarette, and a black permanent marker—onto campus. And if Redding was involved with Marissa in bringing these forms of contraband onto campus, it was certainly more probable that she would be involved with Marissa in bringing another form of contraband, i.e. prescription and OTC pills, onto campus.

Overlaying all of this, Wilson could recall at least two occasions when a student was harmed by taking pills distributed on campus. The most recent case was Jordan's just days earlier when he became violent with his mother and sick to his stomach. And the most serious case nearly resulted in a student's death the year prior.

Wilson certainly hoped to avoid a similar result, or worse, for Redding or any other student, particularly with Jordan's report that the plan was for a group of them to take the pills that day at lunch. So he asked Romero to take Redding to the nurse's office where she could be searched for any pills that might be discreetly hidden in her clothes. J.A. 14a, 19a, 23a.

Romero and Redding entered the nurse's office, and Romero closed and secured the door to prevent anyone from walking in on them. J.A. 15a-16a, 19a, 23a.

The only other person present, Schwallier, was also female. J.A. 15a-17a, 19a-20a, 23a-24a. Romero started by asking Redding to remove her shoes and socks, which Romero checked first. J.A. 16a, 19a, 23a. She then asked Redding to remove her shirt and pants. *Id.* Finally, Romero asked Redding to pull and shake her bra band as well as the elastic of her underwear. J.A. 16a, 19a, 23a-24a.

All of this was done without anyone touching Redding. J.A. 15a-17a, 19a-20a, 23a-24a. And as soon as Romero was able to confirm that Redding did not have any pills, she immediately returned her clothes so that she could get dressed. J.A. 16a-17a, 19a-20a, 23a-24a.

B. Procedural History

1. Redding filed suit in the Superior Court of the State of Arizona seeking money damages against Safford, Wilson, Romero, and Schwallier. Her complaint included a claim brought under 42 U.S.C. § 1983 alleging that the search violated her Fourth Amendment rights. Petitioners timely removed the case to the United States District Court for the District of Arizona, and subsequently moved for summary judgment.

In granting the motion, the district court concluded that petitioners did not violate Redding's Fourth Amendment rights in any respect as the search complied with the standard set forth by this Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *T.L.O.*, the district court explained, balanced students' interest in privacy against the substantial need of educators to maintain discipline and order in the school setting and ultimately adopted

a reasonableness standard that stopped short of probable cause. Pet. App. 141a-42a.

Applying that standard, the district court first considered whether the search was justified at its inception with reasonable grounds for suspecting that it would turn up evidence that Redding was violating Safford's policies. In light of the totality of information available to Wilson, the court unquestionably determined that the search was justified at its inception with clear grounds for suspecting that Redding was in possession of prescription and OTC drugs in violation of Safford's policies. Pet. App. 145a-49a.

Next, the district court considered whether the search was permissible in scope with the measures adopted reasonably related to the objectives of the search and not excessively intrusive in light of Redding's age and sex and the nature of the infraction. In doing so, the court compared the measures adopted to those in several other reported cases and observed that the search for small pills was conducted in the privacy and security of the nurse's office by two female staff members who did not touch Redding in any way. Pet. App. 149a-51a. Accordingly, the court also determined that the search was permissible in scope while rejecting Redding's argument that the Fourth Amendment requires employing the least intrusive means possible. Pet. App. 151a-52a.

Because Redding's Fourth Amendment rights were not violated, the district court did not make any further inquiry concerning qualified immunity.

2. Reviewing the case *de novo*, the Ninth Circuit initially affirmed. Drawing on this Court's precedents, the court of appeals explained that the constitutional rights of students are not coextensive with those of adults in other settings because of the special characteristics of the school environment. Pet. App. 105a-06a. It then applied the *T.L.O.* standard to the search and arrived at precisely the same conclusion as the district court.

In considering whether the search was justified at its inception, the court of appeals observed that there were "several key pieces of information tying [Redding] to the possession and distribution of pills in violation of school policy." Pet. App. 107a. In particular, the court carefully assessed Marissa's implication of Redding as the supplier and found it credible based on the girls' prior interactions and friendship and Redding's admission that she had lent her planner to Marissa. Pet. App. 107a-11a. The court also noted the independent evidence that Redding had recently served alcohol to students, including Marissa, before the school dance. Pet. App. 111a-12a.

For the court of appeals, a major factor in assessing the scope of the search was petitioners' "strong interest both in safeguarding students entrusted to their care from the harm posed by the misuse of prescription drugs and in enforcing the school's official policy." Pet. App. 113a. Moreover, the court acknowledged that petitioners had good cause to be extra vigilant given the prior injuries to students, including a near fatality, from abusing prescription drugs and the report that a group of students was planning to take the pills that day.

Pet. App. 113a-14a. Finally, the court rejected Redding's argument that the Fourth Amendment required petitioners to utilize the least intrusive means possible. Pet. App. 115a-16a.

Like the district court, the court of appeals made no further inquiry concerning qualified immunity because Redding's Fourth Amendment rights were not violated.

3. The Ninth Circuit subsequently reheard the case en banc, reversed the district court's determination that there was no violation of Redding's constitutional rights, and denied Wilson qualified immunity.

The court of appeals concluded, 6-5, that the search was not justified at its inception. For the majority, the issue was not whether a search was justified at its inception, but rather, whether a strip search was justified at its inception. Pet. App. 19a. The majority explained its reframing of the issue this way by reference to intrusiveness. In the majority's view, as the intrusiveness of a search intensifies, so too does the level of suspicion required to justify the search. Pet. App. 18a-19a. Using this sliding-scale approach, the majority determined that petitioners failed to meet the heavy burden of justifying the search based on Marissa's implication of Redding, which the majority criticized as self-serving and self-exculpatory. Pet. App. 22a-24a. Nor did the majority deem any of the corroborating evidence—Jordan's report that Redding had recently served alcohol to students and contraband hidden in

the planner that Redding had lent to Marissa—logically related to the suspicion that Redding was in possession of prescription pills. Pet. App. 24a-26a.

The court of appeals further concluded, 8-3, that the search was not permissible in scope. Once again, the overriding factor for the majority was the question of intrusiveness and the potential emotional impact of the search. Pet. App. 29a-31a. The majority also opined that the suspected infraction—possession of prescription pills—"pose[d] an imminent danger to no one." Pet. App. 29a. Alternatively, the majority believed that Wilson had effectively neutralized any danger by removing Redding from class and bringing her to his office. Pet. App. 32a.

Having determined that Redding's Fourth Amendment rights were violated, the court of appeals proceeded to consider whether those rights were clearly established at the time of the search. The court concluded, 6-5, that they were, thereby depriving Wilson of qualified immunity and subjecting him to trial and possible damages.[4] Unable to find any case on all fours, the majority based its conclusion on *T.L.O.* itself and common sense and reason, which as the majority put it, "supplement the federal reporters." Pet. App. 34a-35a.

As for the dissent, it believed that the majority overlooked the impetus behind *T.L.O.* by failing to acknowledge petitioners' need to act swiftly in

[4] Because the court of appeals concluded that Romero and Schwallier were merely following directions and not acting as independent decision-makers, summary judgment was affirmed as to them. Pet. App. 38a.

protecting students from harm. Pet. App. 44a-47a. Instead, the majority, with the benefit of hindsight, substituted its own judgment for petitioners' in a way that "will cause teachers and administrators to hesitate [even] when they in good faith believe children are at risk." Pet. App. 82a. And the dissent was simply dumbfounded by the majority's determination that Wilson was not entitled to qualified immunity, particularly when the district court and the original panel had both found the search to be constitutional:

> Looking forward, the denial of qualified immunity may have the greatest impact on this circuit's schools. It is now clear that school officials who conduct *T.L.O.* searches that judges later think unreasonable will face trial and the possibility of damages, without any case law to guide them and no means of divining our views of "common sense and reason."

Pet. App. 92a-93a.

4. On October 9, 2008, Safford, Wilson, Romero, and Schwallier filed their petition for a writ of certiorari. On January 16, 2009, the Court granted the petition.

SUMMARY OF ARGUMENT

Under *T.L.O.*, the legality of this search depends simply on its reasonableness.

The search was justified at its inception with reasonable grounds for suspecting that it would turn up evidence that Redding was violating Safford's policies that prohibit the nonmedical use or possession of drugs on campus. Wilson confirmed that prescription pills were being distributed again on campus the morning of the search. Marissa directly implicated her friend Redding as the supplier of those pills, plus another OTC pill, with nothing to gain from doing so. Wilson already had a strong basis for suspecting Redding of having served alcohol, another drug prohibited by Safford's policies, to Marissa and others. And Redding's planner was now sitting open in front of him along with the other forms of contraband found inside.

The only way that the Ninth Circuit managed to avoid the conclusion that the search was justified at its inception was by adopting a sliding-scale approach that is both contrary to *T.L.O.* and unworkable. This approach effectively requires probable cause for some searches in the school setting that may be deemed more intrusive—with no guidance as to where the dividing line may be—despite this Court's conclusion that "the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." *T.L.O.*, 469 U.S. at 341. And as an indication of just how unworkable the approach is, the Ninth Circuit tripped over its own analysis.

The search was also permissible in scope with the measures adopted reasonably related to the objectives of the search and not excessively intrusive in light of Redding's age and sex and the nature of her suspected infraction. Wilson could recall at least two occasions when a student was harmed by taking pills distributed on campus, including a near fatality. He obviously hoped to avoid a similar result, or worse, for Redding, particularly with Jordan's report that the plan was for the group of students to take the pills that day at lunch. And knowing that the pills were small enough to be easily concealed, he thought it was important to have her clothes checked. But out of regard for Redding, he did not participate in the search. Instead, Romero and Schwallier conducted the search in the privacy and security of the nurse's office without ever touching Redding.

The only way that the Ninth Circuit managed to avoid the conclusion that the search was permissible in scope was by substituting its own judgment for Wilson's in violation of *T.L.O.* The Ninth Circuit's determination that the abuse of a prescription drug "poses an imminent danger to no one" ignores both Safford's experience and national studies, which detail the troubling rise in the abuse of prescription and OTC drugs among teens, while unwittingly fueling the dangerous myth that such drugs provide a "safe" high.

This case comes to the Court with the constitutional question having been fully briefed, argued, and decided three times by a total of fourteen judges. And with the benefit of this long-running discussion, the Court is now well-positioned to definitely resolve the constitutional

question. To do anything less would leave wide gaps of uncertainty in the law and cause school officials to hesitate or do nothing at all, even when they in good faith believe that students are at risk.

Finally, the Ninth Circuit's qualified immunity analysis no longer affords school officials any room for error. Indeed, in the Ninth Circuit, school officials are now subject to a higher standard on understanding the law than federal judges and are required to accurately predict the future course of appellate jurisprudence on pain of personal liability. This result is manifestly wrong.

ARGUMENT

I. THE SEARCH WAS CONSTITUTIONAL.

A. Under *T.L.O.*, the legality of this search depends simply on its reasonableness.

In *T.L.O.*, this Court considered the proper application of the Fourth Amendment to a search conducted by a public school official. 469 U.S. at 327-28. At the outset, the Court explained that context matters and requires "balancing the need to search against the invasion which the search entails." *Id.* at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

The Court rejected the argument that students have no legitimate privacy interest, but also acknowledged "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds," especially with the rise in drug use and violent

crime in schools. *T.L.O.*, 469 U.S. at 339. Balancing the two, the Court thought it evident that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *Id.* at 340.

Following this reasoning, the Court held that the warrant requirement is unsuited to the school setting because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* But the Court did not stop there. It also concluded that "the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause." *Id.* at 341. "Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *Id.*

The Court set forth a twofold inquiry for this reasonableness standard, asking first whether the search was justified at its inception, and second, whether the search was reasonable in scope. *Id.* A search will ordinarily be justified at its inception when a school official has "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-42. And a search will be permissible in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342.

But in referring to the nature of the infraction, the Court added the following explanation and direction to lower courts:

> We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules. The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. . . . The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

Id. at 342 n.9.

The Court was satisfied that the reasonableness standard struck the appropriate balance between school officials' need to maintain order on the one hand and students' privacy on the other. *Id.* at 342-43. Of the former, the Court observed that "the standard will spare

teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Id.* at 343.

In the last twenty plus years, the Court has only reaffirmed *T.L.O.* and its rationale. In *Vernonia School District 47J v. Acton*, the Court rejected a Fourth Amendment challenge to a school policy of conducting suspicionless drug testing of student athletes, which required those chosen at random to urinate under a school official's supervision. 515 U.S. 646, 648, 650, 664-65 (1995). The Court succinctly stated that "Fourth Amendment rights . . . are different in public schools than elsewhere" and later acknowledged that the "most significant element" in deciding that the search was reasonable was the school's role "as guardian and tutor of children entrusted to its care." *Id.* at 656, 665.

The Court further characterized the school's interest in deterring drug use as "important—indeed, perhaps compelling" because "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* 661. Moreover, "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.* at 662.

The Court also rejected the argument that the Fourth Amendment requires the least intrusive search possible. *Id.* at 663. And the Court was not willing to require individual suspicion before drug testing, in part, because it would "add[] to the ever-expanding

diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation." *Id.* at 664.

The Court subsequently upheld another drug testing policy that applied not just to student athletes, but to any student involved in any competitive extracurricular activity. *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 825 (2002). With the school setting serving as backdrop, the Court explained that "[a] student's privacy interest is limited . . . where the State is responsible for maintaining discipline, health, and safety." *Id.* at 830. The Court observed that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Id.* at 834. And the Court again rejected the argument that the Fourth Amendment requires employing the least intrusive means because it would "raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Id.* at 837 (quoting *United States v. Martinez Fuerte*, 428 U.S. 543, 556-57 n.12 (1976)).

Finally, the Court just recently held that "[t]he 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." *Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007) (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

As shown, *T.L.O.* and its rationale remain strong. Students still have a diminished expectation of privacy in school. And school officials, in carrying out their custodial responsibility, still retain the flexibility to respond swiftly in order to protect students and maintain order. Rarely will that flexibility be needed more than when school officials confront the threat of drug abuse.

B. The search was justified at its inception.

To date, a total of fourteen judges have reviewed this case and weighed in with their views. And all fourteen are unanimous in the conclusion that a search of Redding was justified at its inception. Indeed, even the majority from the en banc panel conceded that "[f]ollowing the logic of *T.L.O.*, the initial search of [her] backpack and her pockets may have been constitutionally permissible."[5] Pet. App. 22a.

And certainly the record substantiates the conclusion that a search of Redding was justified at its inception with reasonable grounds for suspecting that it would turn up evidence that she was violating Safford's policies that prohibit the nonmedical use or possession of drugs on campus.

---

[5] The majority's statement that petitioners searched Redding's pockets is erroneous as her clothes that day had no pockets. Regardless, the majority's belief that such a search would have been constitutionally permissible necessarily means that a search was justified at its inception. Moreover, at oral argument before the en banc panel, Redding's counsel *repeatedly* conceded that a search of his client was justified at its inception.

Wilson confirmed that prescription pills were being distributed again on campus the morning of the search. J.A. 11a. Marissa directly implicated Redding as the supplier of those pills, plus another OTC pill, based on personal knowledge as she claimed to have received the pills from her. J.A. 13a, 18a. Wilson already had a strong basis for suspecting Redding of having provided alcohol, another drug prohibited by Safford's policies, to Marissa and others before a school dance. Pet. App. 128a; J.A. 7a-8a, 10a-11a. But even then, he continued to investigate further by asking Redding about the planner that had been found near Marissa and its contents, including several knives and lighters, a cigarette, and a permanent black marker. Pet. App. 155a; J.A. 12a-14a, 22a. And although she denied that the contents were hers, she did admit that the planner was hers and that she had lent it to Marissa a few days earlier. *Id.*

1. The Ninth Circuit applied a "crabbed notion of reasonableness."

Nevertheless, the en banc panel applied what this Court described and appropriately criticized as a "crabbed notion of reasonableness." *T.L.O.*, 469 U.S. at 343. School officials should not proceed based solely on an "inchoate and unparticularized suspicion or 'hunch'." *Id.* at 346 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). But they may make "the sort of 'common-sense conclusio[n] about human behavior' upon which 'practical people' . . . are entitled to rely." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)). Moreover, for evidence to be relevant, it "need not conclusively prove the ultimate fact in issue, but only

have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* at 345 (quoting Fed. R. Evid. 401).

Ignoring these principles, the en banc panel set out to marginalize Marissa's implication of Redding as self-serving and self-exculpatory. Pet. App. 22a-23a. But there is nothing in the record to support either of these conclusory labels.

Wilson did not offer Marissa leniency in exchange for information, nor did he attempt to pressure her into naming anyone. He simply asked her where—not who—the blue pill came from. J.A. 13a, 18a. And Marissa's reluctant response could hardly be described as exculpatory because it in no way reduced her own guilt. Even if she did get the pills from Redding, she was still caught with them in her possession and had distributed at least one herself to Jordan.

If anything, Marissa had an interest in not implicating Redding. If Marissa knew that Redding did not have any pills, she could face additional discipline for falsely implicating her, to say nothing of jeopardizing their friendship. *C.B. ex rel. Breeding v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996) (concluding that a fellow student's information that plaintiff carried drugs "was . . . more likely to be reliable because the student informant faced the possibility of disciplinary repercussions if the information was misleading"). And if Marissa knew that Redding did have pills, she still might not implicate her to avoid the stigma of being perceived as a snitch by her peers.

The en banc panel also failed to see the relevance of the available corroborating evidence, including the suspicion that Redding had recently served alcohol to Marissa and the other contraband found in Redding's planner just before the search.

At every stage of this case, the reviewing courts have properly credited Redding's denial that she served or consumed alcohol the night of the school dance. But that does nothing to change the fact that Wilson had ample reason to suspect that she had. His suspicion first developed the night of the school dance while observing the usually rowdy behavior of Marissa, Redding, and others in their small group and noticing the distinct stench of alcohol that followed them around. J.A. 7a, 10a. Then, before the dance ended, a bottle of liquor and pack of cigarettes turned up in the trash in the girls' bathroom. *Id.*

Weeks later, Jordan confirmed Wilson's suspicion when he reported that Redding had served alcohol—Jack Daniel's, Black Velvet, vodka, and tequila—at a party that she hosted in her family's camper trailer before the dance. J.A. 8a, 11a. And of course, Jordan's information proved reliable when he reported that Marissa had given him a pill on the day of the search and Wilson found more of the same pill in her possession. J.A. 11a-12a.

The relevance of Wilson's suspicion that Redding had served alcohol to students, including Marissa, at a pre-dance party is clear. If Redding had previously distributed one type of drug—alcohol—to Marissa and others, it was more probable that she was distributing

another type of drug—prescription and OTC pills—to Marissa and others.

The same can also be said of the contraband found in Redding's planner. Pet. App. 155a; J.A. 12a-14a, 22a. Her admission that she had lent the planner to Marissa further linked the two as friends and raised a concern that she was involved with Marissa in bringing the planner's contents—knives and lighters, a cigarette, and a black permanent marker—onto campus. *Id.* And if Redding was involved with Marissa in bringing these forms of contraband onto campus, it was more probable that she was involved with Marissa in bringing another form of contraband—prescription and OTC pills—onto campus.

Accordingly, Marissa's direct implication of Redding as the supplier of the pills, coupled with this corroborating evidence, justified the search at its inception.

2. The sliding-scale approach is both contrary to *T.L.O.* and unworkable.

Ultimately, the only way that the majority from the en banc panel avoided the conclusion that the search was justified at its inception was by reframing the issue. For the majority, the issue was not whether a search was justified at its inception, but whether a strip search was justified at its inception. Pet. App. 19a.

As ostensible authority for this reframing of the issue, the majority cited to decisions of the Second and Seventh Circuits for the proposition that as the

intrusiveness of a search intensifies, so too does the level of suspicion required to justify the search. *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006); *Cornfield ex rel. Lewis v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993). The majority also pointed to *T.L.O.* and its analysis of two separate searches.

The majority's supposed authority for reframing the issue is deeply flawed. First, although intrusiveness is certainly relevant to the overall question of reasonableness, *T.L.O.* does not list it as a factor for consideration until assessing the scope of the search under the second prong. 469 U.S. at 341-42. Ignoring this, the majority also factored intrusiveness into its analysis of whether the search was justified at its inception under the first prong, and as a result, skewed the careful balance that this Court struck between school officials' need to maintain order on the one hand and students' privacy on the other.

Second, contrary to the majority's assertion, *T.L.O.* did not attribute the two separate searches to a difference in the level of their intrusiveness. The searches were distinct because two different objects were sought, "the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marijuana." *Id.* at 343-44. Indeed, it is difficult to understand how the search for marijuana in T.L.O's purse was any more meaningfully intrusive than the earlier search for cigarettes in the same purse.

Far worse, the majority's flawed authority resulted in an approach that runs contrary to *T.L.O.* If, as the majority advocates, the level of suspicion required to

justify a search varies with the intrusiveness of the search contemplated, the result is a sliding scale. On one end of the scale, minimally intrusive searches require only reasonable suspicion for their justification. While on the opposite end of the scale, more intrusive searches, as the majority deemed the search of Redding to be, require something more than reasonable suspicion for their justification.

The majority conveniently avoided giving a name to this newly minted standard for more intrusive searches. But that did little to hide the fact that it is probable cause in application. Perhaps the best evidence of this is the majority's wholesale adoption of criminal precedents, an area of the law where "reasonableness usually requires a showing of probable cause." *Earls*, 536 U.S. at 828.

For example, the majority attacked the primary source of petitioners' suspicion—Marissa's implication of Redding as the supplier of the prescription and OTC pills—by direct reference to criminal precedents analyzing whether informants' tips are sufficiently reliable. Pet. App. 22a-23a. But the adversarial relationship between law enforcement officials and criminal suspects is not an apt comparison to the relationship between school officials and students, where "[t]he attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education." *T.L.O.*, 469 U.S. at 349-50 (Powell, J., concurring). Nor are school officials in the practice or habit of cutting deals with students in which leniency is exchanged for information that allows officials to pursue other students who may have broken school rules.

Of course, the application of probable cause to this search runs contrary to *T.L.O.*, in which this Court expressly declined to allow the legality of a search in the school setting to hinge on the presence or absence of probable cause. 469 U.S. at 340-41. The Court noted that probable cause "is not an irreducible requirement of a valid search" and observed that "we have in a number of cases recognized the legality of searches . . . based on suspicions that, although 'reasonable,' do not rise to the level of probable cause." *Id.* And in recognition of school officials' need to maintain security and order in schools, the Court concluded that the Fourth Amendment "does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law." *Id.* at 341.

Furthermore, the en banc panel's sliding-scale approach is simply unworkable in application. With its decision in *T.L.O.*, this Court intended to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. But the sliding-scale approach frustrates this intent and results in a legal morass.

This case illustrates the point. The majority examined at least two components of the search in isolation—looking through Redding's backpack and then the search of her clothes. It did so as a product of its sliding-scale approach in which the level of suspicion required to justify a search varies with the intrusiveness of the search contemplated. Because the majority

apparently did not consider the search of Redding's backpack too intrusive, only reasonable suspicion was required for its justification. But because the majority deemed the search of her clothes to be particularly intrusive, probable cause was required. Accordingly, in addition to understanding probable cause, school officials now also need to understand where one component of a search ends and another begins, as well as whether a particular component is intrusive enough to require probable cause instead of reasonable suspicion, or perhaps even some standard in between.

These inquiries are so onerous in their minute detail that even the majority failed to faithfully apply its own analysis. For example, one component of this search was asking Redding to remove her shoes and checking them for pills. But the majority never paused to consider this component in isolation, or for that matter, to opine as to how intrusive this was. Indeed, the majority offered no guidance as to exactly which component(s) of this search crossed that undefined threshold of intrusiveness, such that something more than reasonable suspicion was required as justification.

And if the Ninth Circuit is unable to apply its own legal framework, there is little hope of school officials being able to. "A teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring). A teacher is even less equipped to make such quick judgments while also having to continuously pause to break the contemplated

search down into each of its component parts and then recalibrate the applicable standard based on the level of intrusiveness. Such an exercise also "adds to the ever-expanding diversionary duties of schoolteachers," drawing time, attention, and resources away from education. *Vernonia*, 515 U.S. at 664.

More likely, the sliding-scale approach will end in hopeless confusion for the school officials who are left with the daunting task of trying to apply it. And that confusion will inevitably result in delays, if not paralyzing inaction, in responding to threats to student safety, which could well prove catastrophic when drugs and weapons are introduced into the school setting.

C. The search was reasonable in scope.

A search is permissible in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, 469 U.S. at 342.

In this instance, the measures adopted were reasonably related to the objective of finding prescription and OTC pills. Indeed, the pills were certainly small enough to be concealed in or under Redding's clothing in a way that would avoid superficial detection.

The question then was whether the search was excessively intrusive in light of Redding's age and sex and the nature of the infraction.

1. The search was not *excessively* intrusive.

This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Vernonia*, 515 U.S. at 663. "The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Earls*, 536 U.S. at 837 (quoting *United States v. Martinez Fuerte*, 428 U.S. 543, 556-57 n.12 (1976)).

Petitioners do not deny the potential emotional effect of the search conducted in this case. In fact, it was for this very reason that they specifically took into account both Redding's age and sex.

After checking Redding's backpack, Wilson, a male administrator, withdrew from the search and turned it over to Romero, a female assistant, and Schwallier, a female nurse. J.A. 14a, 16a-17a, 19a-20a, 23a-24a. At the same time, they also moved the search from Wilson's office to the more private environs of the school nurse's office. *Id.* Once inside the nurse's office with the door closed, no one observed or was likely to observe the search, except the two female staff members. J.A. 16a-17a, 19a-20a, 23a-24a. The search lasted only as long as was necessary to insure that Redding did not have any pills on her before Romero immediately returned her clothes and allowed her to get dressed. *Id.* And the search was completed without anyone touching Redding. *Id.*

Of course, Redding's age and sex also have to be considered in proportion to the nature of the infraction. But when considering the nature of the infraction, the Court in *T.L.O.* declined "to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." 469 U.S. at 342 n.9. Instead, the Court advised lower courts to show deference to the judgment of school officials concerning the types of conduct that may threaten student safety and disrupt the school environment:

> The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

Id.

But yet again, the majority from the en banc panel disregarded *T.L.O.* by doing precisely the opposite. The majority's discussion of Redding's suspected infraction omitted any mention of or reference to Wilson's perspective at the time of the search. The majority instead elected to substitute its own judgment for Wilson's, and with all the benefits of hindsight and calm

reflection that were unavailable to him, concluded that the infraction "pose[d] an imminent danger to no one." Pet. App. 29a.

Although this Court's clear expression in *T.L.O.* should have been sufficient to deter the majority in this exercise, the dissent below offered some practical rules that should further prove helpful in guiding courts and school officials when considering the nature of the infraction. For example, the dissent noted that "school officials deserve the greatest latitude when responding to behavior that threatens the health and safety of students or teachers." Pet. App. 77a. And as a corollary, courts should distinguish between "those [searches] intended to uncover evidence of past wrongdoing, and those responding to an ongoing or future threat." *Id.* Under these rules, "when school officials reasonably believe that a student is carrying a weapon or harmful drugs, it will rarely be unreasonable for them to do what they can to neutralize the danger." *Id.*

Viewing the situation from Wilson's perspective at the time of the search, as *T.L.O.* instructs, and applying these rules leads to a very different conclusion about the potential danger posed by Redding's suspected infraction.

Wilson confirmed that prescription pills were being distributed again on campus the morning of the search. J.A. 11a-12a. Jordan reported that the plan was for a group of students to take the pills that day at lunch. *Id.* And then Marissa directly implicated Redding as the supplier of the pills, plus another OTC pill, based on personal knowledge as she claimed to have received the

pills from her. J.A. 13a, 18a. This coupled with the other corroborating evidence made it imminently reasonable for Wilson to believe that Redding was part of this group that had pills and was planning to take them at lunch.

But Wilson still was not sure who else may have been part of the group, what kinds of pills Redding and the others had, and in what amounts. Even with this information, he was in no position to assume that the situation was harmless. Whereas Jordan had only a single prescription-strength ibuprofen pill, Marissa had several plus an OTC naprosyn pill. J.A. 11a-12a, 18a. Had she been planning to take all of the pills at once, some, or only one? And if she took all of the pills at once or a combination of them, what would the result be?

And how would Wilson even be able to predict the result? He could not be expected to know the students' medical histories, including unobservable medical conditions, medications that they may already be taking, and any allergies. Nor could he be expected to have the training or expertise necessary to know all the risks associated with the various pills, their interactions if taken together, and their abuse.

On top of all this, Wilson could recall at least two earlier occasions when a student was harmed by taking pills distributed on campus. The most recent case was Jordan's just days earlier when he became violent with his mother and sick to his stomach. J.A. 7a-8a, 10a-11a. And the most serious case nearly resulted in a student's death the year prior. J.A. 7a, 10a.

So Wilson certainly did consider the nature of the infraction serious as he sought to avoid a similar harm, or worse, to Redding and any other student who may have been involved in the imminent plan to take the pills at lunch. And having given proper regard to Redding's age and sex, as discussed above, the search simply was not *excessively* intrusive under the circumstances.

2. The Ninth Circuit has set a dangerous precedent in substituting its own judgment for that of the school officials.

This Court was wise to not let the legality of a search depend on a judge's determination of the relative importance of school rules. *T.L.O.*, 469 U.S. at 342 n.9. Because as the dissent below noted, "[s]eemingly innocuous items can, in the hands of creative adolescents, present serious threats." Pet. App. 78a. Thus, "[c]ourts may not immediately appreciate the wisdom of a school policy . . . , but that is why judges are not chosen to run schools." *Id.*

On several prior occasions, this Court has also taken judicial notice of the problem of drug abuse that has continued to plague schools. "Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *T.L.O.*, 469 U.S. at 339. "And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Vernonia*, 515 U.S. at 662.

In the same year that petitioners nearly lost a student at Safford Middle School to the abuse of a prescription drug, the Court noted that "[t]he drug abuse problem among our Nation's youth has hardly abated"; to the contrary, "evidence suggests that it has only grown worse." *Earls*, 536 U.S. at 834. And then less than two years ago, and almost four years after the search conducted in this case, the Court acknowledged that "[t]he problem [still] remains serious today." *Morse*, 127 S.Ct. at 2628.

Accordingly, petitioners had thought it inarguable that deterring drug abuse is an "important—indeed, perhaps compelling" concern. *Vernonia*, 515 U.S. at 661. The Ninth Circuit, however, expressed disagreement when it substituted its judgment for Wilson's and concluded that the abuse of a prescription drug "pose[d] an imminent danger to no one." Pet. App. 29a. In fairness, the Ninth Circuit's quarrel does not seem to be with the more general proposition of whether drug abuse is a serious societal problem, but with the question of whether the abuse of prescription and OTC drugs is a component of that problem. If so, the Ninth Circuit is ignorant of the reality that school officials, like Wilson, have been confronting for years.

National studies reveal a troubling rise in the abuse of prescription and OTC drugs among teens. Office of National Drug Control Policy, *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (Jan. 2008). Teens are now abusing prescription drugs far more than any illicit drug except marijuana. *Id.* at 1-2. In fact, prescription drugs are the drug of

choice among 12- to 13-year olds. *Id.* at 2. And these statistics correlate with a sharp increase in poisonings and even deaths related to the abuse of prescription and OTC drugs, particularly when these drugs are abused in combination with other substances such as alcohol. *Id.* at 3-4.

Furthermore, traditional gender differences are reversed when it comes to teens' abuse of prescription drugs, with higher rates of abuse, emergency room visits, and treatment admissions among teen girls. Office of National Drug Control Policy, *Females Bucking Traditional Drug Abuse Trends: Teen Girls, Young Women Now Outpace Male Counterparts for Prescription Drug Abuse, Dependence* (Apr. 30, 2007).

The studies also offer some explanation for this disturbing trend. First, teens have relatively easy access to prescription drugs, with most getting them from family or friends. *Prescription for Danger*, at 4-5. Second, many teens believe the myth that prescription and OTC drugs provide a "safe" high and alternative to street drugs. *Id.* at 3-4.

For this reason, the Ninth Circuit's decision is doubly troubling. In concluding that the abuse of a prescription drug did not pose an imminent danger, the Ninth Circuit has made it more difficult for school officials to respond to that concern as opposed to say a street drug, even though the abuse of the former is the one currently on the rise among students. And at the same time, the Ninth Circuit has unwittingly endorsed the myth that students' abuse of prescription and OTC drugs does not place them at risk.

This disconnect between the Ninth Circuit's conclusion and the reality of today's school environment comes off looking like lunacy and should serve as a cautionary tale for judges who may contemplate substituting their own judgment for that of school officials in such matters.

II. THE COURT SHOULD DECIDE THE CONSTITUTIONAL QUESTION.

In *County of Sacramento v. Lewis*, the Court stated that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." 523 U.S. 833, 841 n.5 (1998). If so, "it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question." *Id.* The Court subsequently made this two-step sequence mandatory in *Saucier v. Katz* by insisting that lower courts first determine whether a constitutional right was violated, rather than "skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." 533 U.S. 194, 201 (2001).

As of last month, the Court has now come full circle on the issue. In *Pearson v. Callahan*, the Court held that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory." 129 S.Ct. 808, 818 (2009). Instead, "[t]he judges of the district courts and courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Id.*

Nevertheless, the Court "continue[s] to recognize that it is often beneficial" to follow the *Saucier* sequence as it "promotes the development of constitutional precedent." *Id.* Indeed, "[a]n immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional" and that uncertainty could work "to the detriment both of officials and individuals." *Lewis*, 523 U.S. at 841 n.5.

The district court and the original panel of the Ninth Circuit decided this case while the *Saucier* sequence was still regarded as mandatory. Accordingly, both began their analysis by determining whether Redding's Fourth Amendment rights were violated by the search conducted here. Pet. App. 106a-07a, 140a-41a. Of course, that was also the ending point of their analysis as both concluded that Redding failed to establish the violation of a constitutional right, even with all of the evidence viewed in the light most favorable to her. Pet. App. 99a, 105a-07a, 116a, 138a, 152a.

The *Saucier* sequence was also regarded as mandatory at the time that the Ninth Circuit reheard the case en banc. But by then, the en banc panel was very much aware that the Court had granted the petition for a writ of certiorari in *Pearson* and had specifically ordered those parties to brief and argue the question as to whether *Saucier* should be overruled. Pet. App. 13a. And yet the en banc panel still felt that it was necessary to determine whether Redding's constitutional rights were violated and not defer its decision until after *Pearson* was resolved. *Id.*

As a result, this case comes to the Court with the constitutional question having been fully briefed, argued, and decided three times. And with the benefit of this long-running discussion between the parties, *amici curiae*, and fourteen judges, the Court is now well-positioned to definitively resolve the constitutional question.

Deciding the constitutional question in this case will also provide some desperately needed guidance to the lower courts and, more importantly, school officials. The Court decided *T.L.O.* nearly twenty-five years ago and has not reviewed a case since that involved a search conducted by school officials based on individualized suspicion of wrongdoing. In the meantime, lower courts have had their struggles in applying the reasonableness standard to such searches.

For example, after a "diligent but unsuccessful search for additional guidance," the Sixth Circuit came to a "troubling conclusion": "the reasonableness standard articulated in *New Jersey v. T.L.O.*, has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. § 1983 cause of action." *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 886 (6th Cir. 1991). Moreover, the Eleventh Circuit observed that "[s]pecific application of the factors established to define the constitutionally permissible parameters of a school search . . . is notably absent from the Court's discussion and conclusion with respect to T.L.O." *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 824-25 (11th Cir. 1997).

And if judges struggle in applying the reasonableness standard, the problem is only compounded for school officials, who do not enjoy the benefits of legal training, briefing and argument, time to reflect, law clerks to conduct research and analysis, etc.

Specifically, deciding the constitutional question here will allow the Court to (1) end the tension between *T.L.O.* and the sliding-scale approach that is gaining acceptance among the lower courts, (2) offer guidance on what weight school officials can appropriately assign to student "tips," and (3) reaffirm the level of deference owed to school officials' judgment concerning the types of conduct that may threaten student safety and disrupt the school environment.

In adopting the sliding-scale approach, the Ninth Circuit joined the Second and Seventh Circuits. *Phaneuf*, 448 F.3d at 596; *Cornfield*, 991 F.2d at 1321. But in doing so, these courts improperly factor intrusiveness into the analysis of whether a search is justified at its inception under the first prong, and thereby skew the careful balance that the Court struck in *T.L.O.* between school officials' need to maintain order on the one hand and students' privacy on the other. Similarly, these courts effectively apply probable cause to more intrusive searches even though *T.L.O.* expressly declined to allow the legality of a search in the school setting to hinge on the presence or absence of probable cause. 469 U.S. at 340-41.

In this instance and many others, the justification for the search is based, in whole or in part, on a student

"tip." The Ninth Circuit, however, criticized Marissa's tip as self-serving and self-exculpatory. As these conclusory labels have no evidentiary basis in the record, the only support offered is the citation to criminal precedents analyzing whether informants' tips are sufficiently reliable. But the adversarial relationship between law enforcement officials and criminal suspects is not an apt comparison to the relationship between school officials and students, where "[t]he attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education." *T.L.O.*, 469 U.S. at 349-50 (Powell, J., concurring). Moreover, "teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child." *Id.* at 348. Given these significant differences, the Court can elucidate the weight that school officials can appropriately assign to student "tips" in determining whether a search is justified at its inception.

Finally, this case presents a prime opportunity for the Court to reaffirm the level of deference owed to school officials. By substituting its own judgment for Wilson's and concluding that the abuse of a prescription drug posed no danger, the Ninth Circuit exposed its ignorance of the fact that the abuse of such drugs is on the rise among teens. *Prescription for Danger*, at 1-2. And it was simply inexcusable for the Ninth Circuit to endorse the myth that the abuse of prescription and OTC drugs is not dangerous when the statistics, to say nothing of Safford's own experience, show a sharp increase in poisonings and even deaths related to the abuse of these drugs. *Id.* at 3-4.

In contrast, dodging the constitutional question, even if the Court were to vacate the Ninth Circuit's en banc decision, would leave wide gaps of uncertainty in the law. With the advent of the sliding-scale approach, school officials can no longer rely on reasonableness as being the standard against which searches will be measured. And with the national attention that this case has drawn, school officials have no choice but to always be mindful of the possibility of being second-guessed by some judge who may simply disagree about the seriousness of the situation confronted. In either case, the net effect is the same—school officials hesitate or do nothing at all, even when they in good faith believe that children are at risk.

III. THE SCHOOL OFFICIALS ARE CERTAINLY ENTITLED TO QUALIFIED IMMUNITY.

Government officials are granted qualified immunity as a "shield[ ] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under this objective test, a court may not deny immunity simply because the official's conduct was ultimately deemed unlawful. *Id.* "If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.*

The Court has also stressed that this inquiry must be made with a certain degree of specificity.

Anderson v. Creighton, 483 U.S. 635, 639-40 (1987). Otherwise, the qualified immunity would be converted "into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*

At this point, petitioners pause to briefly review this case's procedural history because of how highly probative it is on the question of whether Wilson could have reasonably believed, in light of the clearly established law, that the search of Redding was lawful.

In a comprehensive 20-page ruling, the district court concluded that the search did not violate Redding's Fourth Amendment rights. Given the totality of information available to Wilson, the court determined that the search was justified at its inception with clear grounds for suspecting that Redding was in possession of prescription and OTC pills in violation of Safford's policies. Pet. App. 145a-49a. And in comparing the measures adopted for this search to those in several other reported cases, the court also found the search to be permissible in scope. Pet. App. 149a-51a.

The original panel of the Ninth Circuit subsequently affirmed in a published decision. The panel noted all of the information tying Redding to the possession and distribution of pills, including Marissa's credible implication of Redding as the supplier. Pet. App. 107a-12a. The panel also credited petitioners' strong interest in safeguarding students—particularly with the history of prior injuries from students abusing prescription drugs and the report that a group of students was planning to take the pills that day. Pet. App. 113a-14a.

Then on rehearing, a majority of the Ninth Circuit's en banc panel concluded that the district court, the original panel, plus three dissenting judges, all misapprehended the law. But when the majority further concluded, 6-5, that Wilson could not have reasonably believed that the search was lawful based on clearly established law, it departed from an important guiding principle of the qualified immunity doctrine: "If judges thus disagree on a constitutional question, it is unfair to subject [an official] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999); *see also Morse*, 127 S.Ct. at 2641 ("Indeed, the fact that this Court divides on the constitutional question (and that the majority reverses the Ninth Circuit's constitutional determination) strongly suggests that the answer as to how to apply prior law to these facts was unclear.") (Breyer, J., concurring in part, and dissenting in part).

At the current count, Wilson—a school official with no legal training—is being held to a higher standard on understanding the law than five federal judges, including four distinguished members of the Ninth Circuit with decades worth of combined judicial experience. Given this patently absurd result, it can no longer be said that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In denying Wilson qualified immunity, the Ninth Circuit all but repeated the same mistake it made in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam). There, it found that a police officer was not entitled to

qualified immunity because he had fair warning that his conduct was unlawful based on an existing general principle of law. *Id.* at 195, 199. "Of course, in an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law." *Id.* at 199 (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)). The Ninth Circuit's mistake, however, was in concluding that the officer's particular situation presented a case that was obvious enough to be decided by a general standard alone. *Id.* Accordingly, this Court summarily reversed the Ninth Circuit's finding on qualified immunity. *Id.* at 198 n.3.

Similarly, the majority concluded here that Wilson had fair notice that his conduct was unlawful based solely on *T.L.O.* and its general legal framework. But once again, the majority erred in its assumption that Wilson's particular situation presented a case that was obvious enough to be decided on this basis. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) ("Accordingly, *T.L.O.* is useful in 'guiding us in determining the law in many different kinds of circumstances'; but is not 'the kind of clear law' necessary to have clearly established the unlawfulness of the defendants' actions in this case."). Indeed, the majority needed to look no further than the prior decisions of the district court and the original panel, to say nothing of the dissent, to see that this case was not even close to being obvious enough to be decided by a general standard alone.

The majority also would have known that this was not an obvious case if it had bothered to consider the body of relevant case law applying *T.L.O.* For example,

in *Williams*, the Sixth Circuit upheld a "strip search" of a student for an unknown drug even though she did not look disoriented or intoxicated and denied possessing any drug. 936 F.2d at 883, 887. Moreover, the school officials had no information as to where the unknown drug might be, and prior searches of the student's locker and purse had failed to turn up any evidence of drug use. *Id.* The student also alleged that the assistant principal touched her during the search and was the one to pull on the elastic of her undergarments. *Id.*

Similarly, in *Cornfield ex rel. Lewis v. Consolidated High School District No. 230*, the Seventh Circuit upheld a strip search of a student suspected of hiding an unknown drug because of an "unusual bulge" in the crotch area of his sweatpants. 991 F.2d 1316, 1319, 1323 (7th Cir. 1993). Even after the student's mother refused consent, school officials proceeded with the search, which included a visual inspection of the student's naked body. *Id.*

In yet another case, a district court upheld a search of a thirteen-year-old boy in which the school official "patted" the boy's crotch, pulled the boy's pants down, and inspected the waistband of his underwear in search of some stolen money. *Singleton v. Board of Educ. USD 500*, 894 F. Supp. 386, 388-89, 390-91 (D. Kan. 1995).

In addition to the cases that support the constitutionality of the search of Redding, there are also cases that grant qualified immunity to school officials who conducted searches that were far more clearly unconstitutional. For example, in *Jenkins*, an en banc panel of the Eleventh Circuit considered the searches

of two eight-year-old girls who were asked to remove their clothes, with their underpants down to their ankles, after being suspected of taking seven dollars from a classmate's purse. 115 F.3d at 822-23. Later that day, the girls were even asked to remove their clothes for a second time. *Id.* Declining to decide the constitutionality of the searches, the court nevertheless concluded that the officials were entitled to qualified immunity because *T.L.O.* was not specific enough to place a reasonable official on notice under these circumstances that the search was unlawful. *Id.* at 824-28.

The Eleventh Circuit reached a similar conclusion in *Thomas ex rel. Thomas v. Roberts*. (*Thomas I*) 261 F.3d 1160 (11th Cir. 2001), *vacated*, 536 U.S. 953 (2002), *reinstated*, (*Thomas II*) 323 F.3d 950 (11th Cir. 2003). The case involved a search of an entire fifth-grade class—in the absence of any individualized suspicion—after an envelope containing twenty-six dollars went missing. *Thomas I*, 261 F.3d at 1163-64. The boys were taken to the bathroom in groups of four to five and shown what to do by the school official who pulled his own pants and underwear down to his ankles. *Id.* at 1164. The boys then pulled their own pants down, and some of them pulled down their underwear too. *Id.* As one group did this, two girls watched through the bathroom's open door. *Id.* Once the boys were done, it was the girls' turn. *Id.* The girls entered the bathroom in groups of two to five and were made to lower their pants and raise their dresses or shirts. *Id.* Most were also required to lift their bras and expose their breasts, and some were touched by the teacher in the process. *Id.*

The Eleventh Circuit did conclude that these suspicionless searches for money violated the students' Fourth Amendment rights. *Thomas I*, 261 F.3d at 1169. But it also concluded that the school officials were entitled to qualified immunity, stating that "[i]f the salient question is whether *T.L.O.* gave the defendants 'fair warning' that a 'strip search' of an elementary school class for missing money would be unconstitutional, then the answer must be 'no.'" *Thomas II*, 323 F.3d at 954.

From these cases emerges an important lesson, one that the Ninth Circuit failed to learn even after *Brosseau*. Although a general principle of law—like *T.L.O.*—may control, that is no excuse to ignore the body of relevant case law that has applied that general principle to fact-specific situations. That case law "may provide authority that clearly establishes a right," but it "may also create the legal ambiguity that allows a reasonable official to invoke the protections of the qualified immunity defense." Pet. App. 85a.

In the view of the majority from the en banc panel, Wilson misapprehended the law. Of course, if that is true, so too did the district court, the original panel, plus three dissenting judges. But the difference is that only Wilson is branded a constitutional violator, and only he is now subject to trial and personal liability. This is manifestly wrong.

School officials have a difficult enough job protecting students and maintaining order without the daunting threat of liability for damages solely because their legal sophistication does not allow them to predict the future

course of appellate jurisprudence. And no one could have foreseen that the Ninth Circuit would defy this Court's controlling authority in *T.L.O.*, both in its adoption of probable cause for some school searches and its willingness to displace the judgment of school officials in highly discretionary matters.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit that the search was unconstitutional and that Wilson could not have reasonably believed that the search was lawful.

Respectfully submitted,

MATTHEW W. WRIGHT
Counsel of Record
DAVID K. PAUOLE
HOLM WRIGHT HYDE & HAYS PLC
10429 South 51st Street
Suite 285
Phoenix, AZ 85044
(480) 961-0040

Attorneys for Petitioners

February 25, 2009

RESPONDENT'S BRIEF

08-479

IN THE

Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, *et al.*,
Petitioners,

—v.—

APRIL REDDING, legal guardian of minor child,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

BRUCE G. MACDONALD
MCNAMARA, GOLDSMITH, JACKSON & MACDONALD, P.C.
1670 E. River Rd., Ste. 200
Tucson, AZ 85718
(520) 624-0126

ANDREW J. PETERSEN
HUMPHREY & PETERSEN, P.C.
3861 E. Third St.
Tucson, AZ 85716
(520) 795-1900

DANIEL JOSEPH POCHODA
ACLU OF ARIZONA
P.O. Box 17148
Phoenix, AZ 85011
(602) 773-6003

ADAM B. WOLF
Counsel of Record
GRAHAM A. BOYD
M. ALLEN HOPPER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
1101 Pacific Ave., Ste. 333
Santa Cruz, CA 95060
(831) 471-9000

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

QUESTIONS PRESENTED

1. Whether it is reasonable to subject a thirteen year-old girl to the indignity of a strip search based on an unreliable accusation that she previously possessed ibuprofen and no information that she possessed ibuprofen in her undergarments at the time of the search.

2. Whether a school official should know not to order the traumatic strip search of a child based on an unreliable accusation that the child previously possessed ibuprofen and no information that she possessed ibuprofen in her undergarments at the time of the search.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 8

ARGUMENT 12

I. STUDENT STRIP SEARCHES INVADE SUBSTANTIAL AND REASONABLE EXPECTATIONS OF PRIVACY THAT ARE ENHANCED BY THE AGE OF THE CHILD AND UNDIMINISHED BY THE SCHOOL SETTING 12

II. THE STRIP SEARCH OF SAVANA WAS UNCONSTITUTIONAL BECAUSE PETITIONERS LACKED SUFFICIENT AND SPECIFIC SUSPICION TO FORCE HER TO EXPOSE HER GENITAL AREA AND BREASTS. 16

A. The Fourth Amendment Requires Greater Suspicion of Wrongdoing For a Strip Search To Be Justified At Its Inception Than for the Search of a Student's Backpack 19

B. The Fourth Amendment Requires Suspicion That An Object Is Currently Hidden Beneath Undergarments For a Search Of Those Undergarments To Be Reasonable In Its Scope 25

C. The Strip Search of Savana Was Unreasonable Both At Its Inception and In Its Scope 28

III. THE COURT OF APPEALS PROPERLY DENIED QUALIFIED IMMUNITY BECAUSE BINDING PRECEDENT AND COMMON SENSE DICTATE THAT IT IS PATENTLY UNREASONABLE TO STRIP SEARCH A THIRTEEN-YEAR-OLD GIRL BASED ON AN UNCORROBORATED ACCUSATION THAT THE GIRL PREVIOUSLY POSSESSED IBUPROFEN IN SOME UNKNOWN LOCATION. 44

CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Alabama v. White, 496 U.S. 325 (1990) 29

Appeal in Pima County Juvenile Action, No. 80484-1, 733 P.2d 316 (Ariz. Ct. App. 1987) 47

Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) 16

Bilbrey ex rel. Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984) .....*passim*

C.B. ex rel. Breeding v. Driscoll, 82 F.3d 383 (11th Cir. 1996) 32, 36

Camara v. Mun. Court, 387 U.S. 523 (1967) 17

Chapman v. Nichols, 989 F.2d 393 (10th Cir. 1993) 13

Ciraolo v. City of New York, 216 F.3d 236 (2d Cir. 2000) 13

Cornfield ex rel. Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) 13, 21, 35

Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980)..... 37, 49

Eddings v. Oklahoma, 455 U.S. 104 (1982)..... 16

Fewless ex rel. Fewless v. Bd. of Educ. of Wayland Union Sch., 208 F. Supp. 2d 806 (W.D. Mich. 2002)..... 21

Groh v. Ramirez, 540 U.S. 551 (2004)..... 47

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 45

Hope v. Pelzer, 536 U.S. 730 (2002) 45, 49

Hudson v. Palmer, 468 U.S. 517 (1984) 12

Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982) 14

Illinois v. Gates, 462 U.S. 213 (1983) 26, 34

Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992) 13

Lilly v. Virginia, 527 U.S. 116 (1999) 30, 31

M.M. v. Anker, 607 F.2d 588 (2d Cir. 1979) 22

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983) 14, 31

Monell v. Department of Social Services, 436 U.S. 658 (1978) 44

New Jersey v. T.L.O., 469 U.S. 325 (1985) .....*passim*

O'Connor v. Ortega, 480 U.S. 709 (1987) 12, 25

Ornelas v. United States, 517 U.S. 690 (1996) 24

Phaneuf v. Fraikin, 448 F.3d 591 (2d Cir. 2006) 21, 36

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) 6, 38

Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997) 13

Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984) 36

Terry v. Ohio, 392 U.S. 1 (1968) 17, 25

United States v. Grubbs, 547 U.S. 90 (2006) 26

United States v. Hall, 113 F.3d 157 (9th Cir. 1997) 30

United States v. Place, 462 U.S. 696 (1983) 13

United States v. Ross, 456 U.S. 798 (1982) 26

Williams ex rel. Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991) 35, 37

Wilson v. Layne, 526 U.S. 603 (1999) 45

Wyoming v. Houghton, 526 U.S. 295 (1999) 12, 26

Other Authorities

Ann L. Majestic et al., *Legal and Policy Issues in Curbing Violence in Schools*, *in* Jonathan A. Blumberg et al., Legal Guidelines for Curbing School Violence 2 (National School Board Association Council of School Attorneys 1995) 22

Charles W. Avery & Robert J. Simpson, *Search and Seizure: A Risk Assessment Model for Public School Officials*, 16 J.L. & Educ. 403 (1987) 23

David C. Blickenstaff, *Strip Searches of Public School Students: Can* New Jersey v. T.L.O. *Solve the Problem?*, 99 Dick. L. Rev. 1 (1994) 23

Doriane Lambelet Coleman, *Storming the Castle To Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413 (2005) 15

Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. Sch. Psychology 7 (1998) 15

Jacqueline A. Stefkovich, *Strip Searching After Williams: Reactions to the Concern for School Safety?*, 93 Ed. L. Rep. 1107 (1994) 23

John S. Aldridge & John A. Wooley, Legal Guidelines for Permissible Student Searches in the Public Schools 19 (1990) 23

Larry Bartlett, New Jersey v. T.L.O.: *Not an End to School Search Litigation or Commentaries*, 23 Ed. L. Rep. 801 (1985) 23

Laura L. Finley, *Examining School Searches as Systemic Violence,* 14 Critical Criminology 117 (2006) 15

Nathan L. Essex, School Law & The Public Schools: A Practical Guide for Educational Leaders 42 (2d Ed. 1999) 23

Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 So. Cal. L. Rev. 921 (1997) 15

Stephen F. Shatz *et al.*, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1 (1991) 15

STATEMENT OF THE CASE

1. Thirteen-year-old Savana Redding was an eighth-grade student at Safford Middle School ("SMS") in the fall of 2003. J.A. 21a; Pet. App. 2a. An honors student, Savana had never been disciplined by the school. J.A. 21a.

Savana was in math class at SMS on October 8, 2003, when the school's Vice Principal, Kerry Wilson, entered her classroom. *Id.* Wilson asked Savana to pack her belongings in her backpack and follow him to his office. *Id.* He did not explain to Savana why he was removing her from class.

When they reached his office, Wilson admonished Savana about the importance of her telling him the truth. *Id.* Knowing she had nothing to worry about, Savana complied, affirming that she of course would be honest with Wilson. *Id.*

Savana then noticed that her planner was sitting open on Wilson's desk. *Id.* at 22a. But the items visible inside the planner, including knives, a lighter, and a cigarette, did not belong to her. *Id.* When asked about the planner, she honestly told Wilson that she had lent the planner several days ago to a fellow student named Marissa Glines and that the present contents of the planner were not her possessions. *Id.*

Wilson then pointed to four white pills and one blue pill, which were sitting atop his desk, *id.*, and which he by then knew to be 400 mg ibuprofen and the over-the-counter anti-inflammatory pill Naprosyn, *id.* at 12a, 13a. He asked Savana if she had seen these pills before, and she truthfully told

Wilson that she had not previously seen the pills. *Id.* at 22a. Savana also verified for Wilson that she had never brought any pills to school and had never given any pills to any Safford student. *Id.* at 23a. Savana's explanations neither seemed evasive nor otherwise aroused suspicion. *See also* Pet. App. 22a (noting that Petitioners had no basis for believing that Savana "was anything less than truthful" during her discussion with Wilson).

Wilson asked if he could search Savana's belongings, and Savana agreed. J.A. 23a. He and an administrative assistant, Helen Romero, searched Savana's backpack. *Id.* Consistent with Savana's assurances, they found nothing—no indicia of drug use, drug possession, or any other illegal or improper conduct. *Id.*

Having turned up no evidence to suggest any misconduct by Savana, Wilson nonetheless immediately ordered Romero to take Savana to the nurse's office. *Id.* Savana did not know why she was being marched into the nurse's office. As the door slammed and locked behind Savana, *id.* at 16a, the school nurse, Peggy Schwallier, was in the bathroom washing her hands, *id.* at 23a. At that point, Romero explained that they intended to search Savana for pills. *Id.* at 16a. The two school officials then directed Savana to undress. *Id.* at 23a. With both officials staring at Savana, she took off her pants and her shirt. *Id.* The officials did not notice any pills hidden in Savana's clothing, on her body, or under her panties or bra. *Id.* at 14a. Still, they told Savana to pull out her panties and bra and to move them to the side. *Id.* at 23a-24a. This order forced

Savana to expose her genital area and breasts to the school officials. *Id.* The observation of Savana's genital area and breasts, like the search of her backpack, failed to reveal any pills. *Id.* at 23a.

The school officials' viewing of Savana's naked body was "the most humiliating experience" of her life. *Id.* at 25a. Embarrassed and scared, Savana held her head down throughout the strip search "so that they could not see that I was about to cry." *Id.* at 24a. Throughout this ordeal, Savana was not permitted to call her mother. *Id.* at 25a. Following the incident, Savana, an honor-roll student at SMS, transferred to a different school. Pet. App. 137a.

2. Savana ended up naked and humiliated in front of her school officials due to an accusation provided that morning by Marissa. Acting on a tip by SMS student Jordan Romero that Marissa had just provided a pill to him on campus, Wilson went to Marissa's classroom. J.A. 12a.[1] As Wilson asked Marissa to leave the classroom with him, he noticed a planner in the desk next to her. *Id.* Marissa's teacher did not know who owned the planner, but when Wilson and Marissa walked by the classroom a short time later, the teacher showed Wilson that the planner contained various objects, including knives, a cigarette, and a lighter. *Id.* Wilson took the planner and its contents, and he escorted Marissa to his office. *Id.*

---

[1] Jordan did not mention Savana's name that day, and he never indicated to Wilson—or any other school official—that Savana was involved in the possession or distribution of pills. Pet. App. 6a, 7a.

Wilson asked Marissa about her connection to the planner. *Id.* at 13a. She disclaimed any knowledge of the planner or its contents. *Id.* He then asked Marissa to open her wallet and empty her pockets, which she did, revealing a blue pill, several white pills, and a razor blade. *Id.* at 12a. The white pill was identical to the pill that Jordan claimed he received from Marissa. *Id.* Schwallier had previously advised Wilson that this white pill was 400 mg ibuprofen, a prescription-strength anti-inflammatory pill that has the strength of two over-the-counter Advil capsules. *Id.*; Pet. App. 2a, 8a.

When Wilson asked Marissa where she had gotten the blue pill, which Schwallier had identified as Naprosyn, Marissa replied that she had received the pills from Savana. J.A. 13a. Marissa did not provide any further information regarding the pills or Savana. She did not state, for example, when Savana allegedly provided her with the pills, where Savana allegedly gave her the pills, where Savana allegedly kept such pills (e.g., in her house, in her purse, in her locker, or on her person), or even whether Savana currently possessed any pills. *See* Pet. App. 8a. Nor did Wilson ask any such follow-up questions. *See id.* at 10a (noting that Wilson did not "question[] or investigat[e]" Marissa about her accusation concerning Savana).

Wilson then told Romero to escort Marissa to the nurse's office to search her clothing. J.A. 13a. Romero, aided by Schwallier, asked Marissa to remove her socks and shoes, raise up her shirt and pull out the band of her bra, take off her pants, and stretch the elastic on her underwear. *Id.* at 16a.

(Unlike their execution of the strip search of Savana, the school officials did not ask Marissa to take off her shirt. *Id.*) This search in the nurse's office did not yield any more pills in Marissa's possession. *Id.*

3. The path from Marissa's accusation to Savana's being strip searched was quick and direct. Even though Wilson already had isolated Savana in his office and thereby contained any possible danger to other students, he proceeded to strip search Savana without asking Marissa for any details about Savana's alleged misconduct and without seeking any information from Savana's mother or from other students or teachers.

Wilson sought to gather further facts regarding students' possible pill possession only *after* the examination of Savana's body and undergarments failed to yield any pills. *See* Pet. App. 9a-10a For two-and-a-half hours following her strip search, Savana was forced to sit alone outside the Vice Principal's office. J.A. 24a. During that time she saw several individuals come through Wilson's office, including Jordan and another student, Chris Clark; a policeman; Marissa's father; and the Principal. *Id.* Savana learned that school officials searched Chris later that morning by asking him to empty his pockets and shake out his shirt and pants; they did not ask Chris to remove any of his clothing. *Id.* at 24a-25a. Petitioners searched Chris even though they subsequently acknowledged that "[n]o one ever identified [him] as possessing or distributing pills." *Id.* at 27a. The record is silent as to whether the school ever determined the real source of Marissa's pills, but what is clear is that the

school strip searched Savana first, based on Marissa's vague, uncorroborated, and unreliable accusation, and only later began asking questions.

Now in litigation, Petitioners further justify the disrobing of Savana through unrelated accusations that disparage Savana's character. For instance, they allege a disputed fact that Savana purportedly served alcohol at a pre-dance party held many months before the strip search.[2] *Compare id.* at 8a, *with id.* (recognizing that Savana's mother denied this allegation), and *id.* at 26a (Savana's stating that she did not serve alcohol to anyone prior to the school dance). They further claim that Savana was seen at this dance mingling with a group of girls, some of whom appeared intoxicated, even though the undisputed evidence in the record is that Savana did not drink alcohol before or during the dance. *Id.* at 7a, 26a. Finally, they note that Savana lent her planner to Marissa several days before the strip search, but they fail to mention the undisputed fact that Wilson knew at the time of Savana's strip search that the contents of the planner (including knives) were Marissa's, not Savana's. *Id.* at 22a. All of these contentions, including even the controverted facts, fail to link Savana to the pills. They concern disputed events that transpired, if at all, days or months before the strip search. Most importantly, they do not bolster suspicion that Savana was

---

[2] This case comes to this Court on Petitioners' motion for summary judgment. Accordingly, all disputed facts and all reasonable inferences drawn from the record must be resolved in favor of Respondent. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000).

concealing ibuprofen pills in her panties and bra at the time that Wilson ordered the strip search.

4. Savana was not permitted to call her mother before or during the search. *Id.* at 25a. When Savana told her mother about the strip search later that day, her mother was extremely upset. *Id.* Savana's mother demanded a meeting with the Principal, who told Savana and her mother that he "did not think the strip search was a big deal because they did not find anything." *Id.*

5. Through her mother, Savana filed a complaint against Petitioners, the school district and the school officials involved in the strip search, for violations of the Fourth Amendment and state law. Pet. App. 10a, 127a. A federal magistrate judge granted Petitioners' motion for summary judgment, and a three-judge panel of the court of appeals, over a vigorous dissent, affirmed. *Id.* at 10a-11a. Upon a vote of the majority of its active judges, the court of appeals ordered rehearing en banc. *Id.* at 12a.

Applying this Court's and lower-court precedent, the en banc court held that the strip search of Savana was unreasonable and violated the Fourth Amendment. *Id.* at 12a-33a. It concluded that Petitioners "acted contrary to all reason and common sense as they trampled over [Savana's] legitimate and substantial interests in privacy and security of her person." *Id.* at 16a.

The court held that the strip search of Savana was neither justified at its inception, *id.* at 18a-28a, nor reasonable in its scope, *id.* at 28a-33a. Strip searching Savana was not justified at its inception,

the court held, because Petitioners forced Savana to disrobe only upon the vague and uncorroborated accusation by an unreliable juvenile that Savana previously possessed ibuprofen. *See especially id.* at 21a-24a. Nor was the search reasonable in scope, as Petitioners looked under Savana's underwear and forced the exposure of her genital area and breasts when "no information pointed to the conclusion that the pills were hidden under her panties or bra (or that Savana's classmates would be willing to ingest pills previously stored in her underwear)." *Id.* at 29a.[3]

The court also concluded that "[t]he record . . . leaves no doubt that it would have been clear to a reasonable school official in Wilson's position that the strip search violated Savana's constitutional rights." *Id.* at 37a-38a. Accordingly, the court held that Wilson was not entitled to qualified immunity, even though qualified immunity was granted to the officials who merely followed Wilson's strip-search order. *Id.*

SUMMARY OF ARGUMENT

Children call their genitalia and breasts "private parts" for good reason. A child's "private parts" are not subject to observation by school

---

[3] Eight of the eleven judges on the en banc panel concluded that the strip search of Savana violated the Fourth Amendment. Pet. App. 1a-38a (majority opinion), 39a-41a (Gould, J., joined by Silverman, J., dissenting) (agreeing with majority that "our ruling should be crystal clear that schools may not subject a student to a strip search under circumstances as presented here").

officials without significant justification. One unreliable accusation that Savana possessed ibuprofen at some unspecified time in the past and in an unknown location did not provide sufficient reason to observe Savana's genital area and breasts. Petitioners' search inside Savana's undergarments clearly violated Savana's Fourth Amendment rights.

I. Respondent and Petitioners agree on the baseline protection offered by the Fourth Amendment: freedom from "unreasonable" searches. They also agree that school officials must "regulate their conduct according to the dictates of reason and common sense." *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985). This case asks whether a school official, hearing an accusation that a thirteen-year-old girl provided ibuprofen to another student at some time in the past, exhibits reason and common sense when he jumps to the conclusion that this girl is currently storing ibuprofen inside her undergarments and then forces her to disrobe and expose her genital area and breasts to school officials.

A. A search by school officials is reasonable when it is both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 341. Three federal circuit courts have held, and common sense suggests, that school officers must have a stronger factual basis to force a child to undress and submit her body for inspection than to search her backpack. If not, the strip search is not justified at its inception. Moreover, a school's search underneath a child's undergarments is reasonable in its scope only when school officials possess specific

information that leads them reasonably to believe that the object for which they are searching is in fact located against the child's genitalia or breasts.

B. It was unreasonable for Petitioners to have forced Savana to bare her genital area and breasts to her school officials. The information that school officials possessed would not have led a reasonable person to believe that Savana was concealing pills underneath her panties or bra. Petitioners executed the strip search after Marissa, caught with ibuprofen and Naprosyn, told Wilson she received the pills from Savana. Marissa did not say when she allegedly received pills from Savana or where Savana allegedly kept the pills. Based on this vague and uncorroborated accusation from an unreliable teenager who had been caught with pills in her possession, school officials subjected Savana to an invasive and traumatic strip search without conducting any further investigation until after the strip search was completed and produced nothing. On these facts, their actions were plainly unreasonable, and the decision to strip search Savana was unjustified at its inception.

The strip search of Savana was also unreasonable in its scope. Petitioners' scant evidence failed to provide any information that Savana was concealing ibuprofen in her panties or bra. After Petitioners searched Savana's backpack—the usual place students store their possessions—they forced Savana to push aside her undergarments in a manner that exposed the most private parts of her body. Without a grounded belief that they would find ibuprofen in Savana's

undergarments, Petitioners' search in that uniquely private location was unreasonable because it was based on nothing more than a mere hunch.

II. The strip search of Savana conflicted with established case law and violated both common sense and Savana's dignity. Accordingly, the court below properly denied qualified immunity to the school official who ordered this traumatic, unreasonable search.

At the time of the strip search of Savana, binding precedent from both the Ninth Circuit and the Arizona state courts dictated that a non-specific accusation of prior ibuprofen possession could not, by itself, justify a strip search. Even if Marissa's accusation were true, which it was not, Savana could have provided the ibuprofen pills earlier that week, month, or year; and there was no suggestion that Savana ever possessed ibuprofen against her genitalia or breasts. With such a paucity of information, a school official may reasonably have attempted to gather additional facts. However, a school official was on notice not to have ordered a traumatizing search of a thirteen-year-old girl's body on a mere hunch that the girl possessed ibuprofen at the time of the search and a baseless guess that the ibuprofen was being stored against her genitalia.

ARGUMENT

I. STUDENT STRIP SEARCHES INVADE SUBSTANTIAL AND REASONABLE EXPECTATIONS OF PRIVACY THAT ARE ENHANCED BY THE AGE OF THE CHILD AND UNDIMINISHED BY THE SCHOOL SETTING.

The strip search of Savana traumatized this adolescent girl. Petitioners not only removed Savana's clothes, they violated her dignity. When school officials strip search children, they invade privacy in a profound manner and risk lasting harm in ways that are categorically different from everyday searches of lunchboxes, backpacks, or lockers.

Fourth Amendment analyses typically commence with an assessment of the plaintiff's "legitimate expectation of privacy." *Hudson v. Palmer*, 468 U.S. 517, 525 (1984). In making that assessment, courts must consider to what extent a challenged search infringes "an expectation of privacy that society is prepared to consider reasonable." *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). When a thirteen-year-old girl is forced to disrobe and bare her genital area and breasts to school officials, case law and academic research agree that her expectation of privacy is at its apex.

1. The law does not equate a person's relationship to her body with her relationship to her property. *See generally Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (distinguishing cases involving intrusions on "personal privacy" because the search

at issue involved the lesser intrusion of a search of belongings). Judicial opinions properly recognize that strip searches are an extreme intrusion and a unique personal violation. A limited search of one's possessions can be a significant privacy invasion. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 708 (1983). As this Court has recognized, a search of a student's purse, even in a school, is "undoubtedly a severe violation of subjective expectations of privacy." *T.L.O.*, 469 U.S. at 337-38. But the privacy interest implicated by a search of a student's purse or locker is not comparable to the privacy invasion when school officials order the forced visual inspection of a teenage girl's naked body, breasts, and genital area.

Courts have consistently recognized the indignity and trauma caused by a strip search. "The experience of disrobing and exposing one's self for visual inspection [by an official]," the Tenth Circuit stated, "can only be seen as thoroughly degrading and frightening." *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993). Courts around the country concur. *See, e.g.*, *Ciraolo v. City of New York*, 216 F.3d 236, 237, 238 (2d Cir. 2000) (calling a strip search "traumatiz[ing]," "humiliati[ng]," and "demeaning"); *Swain v. Spinney*, 117 F.3d 1, 6-7 (1st Cir. 1997) (citing opinions that deem strip searches "terrifying" and "dehumanizing"); *Cornfield ex rel. Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993) ("No one would seriously dispute that a nude search of a child is traumatic."); *Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992) (recognizing strip searches to be

"thoroughly degrading and frightening"); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (describing a strip search as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission").

2. Petitioners do not deny that strip searches traumatize children. Instead, they discount the trauma they inflicted upon Savana by noting that the search could have been even more harrowing, and, in any event, the search was "[not] a big deal because they did not find anything [on Savana's person]." Pet. Br. 34; J.A. 25a. It is true that Petitioners could have inflicted even more trauma if, for instance, a male administrator had executed the search or if the school officials who conducted the search had touched Savana inappropriately in the process. Pet. Br. 34. (highlighting these two examples). But the fact that Petitioners could have ratcheted up the invasion of Savana's privacy to such shocking dimensions does not diminish the trauma, degradation, and thorough humiliation that occurs when a thirteen-year-old girl is ordered to undress, stand naked, and expose her genital area and breasts to her school officials. Pet. App. 31a ("[T]hat the student is viewed rather than touched, do[es] not diminish the trauma experienced by the child.") (internal citation omitted; second alteration in original) (citing academic study); *see also, e.g.*, *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) ("[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience.").

Social science literature bolsters judicial observations in concluding that a school official, in deciding to strip search a child, sets in motion a range of harms that include profound, enduring consequences. Children who are strip searched by school officials experience serious and often lasting emotional trauma. *See* Pet. App. 30a-31a (quoting, among other sources, Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. Sch. Psychology 7, 13 (1998)); *see also, e.g.*, Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 So. Cal. L. Rev. 921, 928-31 (1997). For children, the immediate humiliation of a strip search often then translates into a more pervasive loss of self-esteem, resulting in lasting difficulties in their relationships with their families, peers, and educators. *See, e.g.*, Laura L. Finley, *Examining School Searches as Systemic Violence,* 14 Critical Criminology 117, 126 (2006). Adolescents who are strip searched in school experience, at the very least, deep feelings of stigma, shame, and worthlessness. *See, e.g., id.* For many children, a strip search causes serious mental illnesses such as sleep disorders, recurrent recollections of the event, lack of concentration, anxiety, depression, phobic reactions, and suicide attempts. Pet. App. 31a (citing Stephen F. Shatz *et al.*, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991)). A child who is strip searched can experience trauma similar in kind and degree to the suffering of sexual-abuse victims. Doriane Lambelet Coleman,

Storming the Castle To Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment, 47 Wm. & Mary L. Rev. 413, 520-21 (2005); Gartner, 70 So. Cal. L. Rev. at 929. Because adolescence is "a time and condition of life when a person may be most susceptible to . . . psychological damage," *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), it is hardly surprising that strip searches of adolescents are deeply traumatic events.

Savana was traumatized when she was locked in a room and forced to strip, exposing her genital area and breasts to school officials. Her legitimate expectation of privacy in her naked body was extraordinarily high.

II. THE STRIP SEARCH OF SAVANA WAS UNCONSTITUTIONAL BECAUSE PETITIONERS LACKED SUFFICIENT AND SPECIFIC SUSPICION TO FORCE HER TO EXPOSE HER GENITAL AREA AND BREASTS.

A strip search is a scarring, harrowing event for a thirteen-year-old girl. In order to lawfully impose this uniquely serious and demonstrably harmful privacy invasion, a school must have a significant and specific rationale to conduct such a search. As *amicus curiae* United States recognizes, Petitioners did not come close to clearing this hurdle on the record before this Court.

In schools, as elsewhere, searches violate the Fourth Amendment when they are "unreasonable." *T.L.O.*, 469 U.S. at 337; *see also Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v.*

Earls, 536 U.S. 822, 828 (2002). At its most general level, the reasonableness of a search is measured by "balancing the need to search against the invasion which the search entails." *T.L.O.*, 469 U.S. at 337 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967)). "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order." *T.L.O.*, 469 U.S. at 337.

Petitioners urge this Court to dispense with any balancing of interests in favor of a bright-line, all-purpose rule that permits even the most invasive searches upon minimal and non-specific information. Their position defies the teaching of *T.L.O.* and conflicts with this Court's Fourth Amendment jurisprudence. Whatever the Fourth Amendment means, surely it requires a greater justification to peer inside the undergarments of a thirteen-year-old girl than to open her backpack.

The *T.L.O.* Court set forth a "twofold inquiry" to determine the reasonableness of a school search: First, in order to be reasonable, the search must be "justified at its inception"; second, a search must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). "Under ordinary circumstances," the Court noted, a search will be justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-42. School

searches are generally permissible in their scope when they are "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342.

T.L.O. concerned the search of a student's purse and its contents. Until now, this Court has not had occasion to apply the *T.L.O.* framework to a student strip search. Applying *T.L.O.*'s two-prong analysis in this context naturally leads to two conclusions: First, a strip search of a child is justified at its inception only when the school possesses a stronger factual basis to suspect wrongdoing than the bare minimum necessary to search a student's backpack or purse. By any definition, forcing a student to remove her clothes in front of school officials is a uniquely severe invasion of privacy. It therefore requires more than the non-specific, unreliable, and uncorroborated evidence of wrongdoing revealed by this record in order to be found reasonable under the Fourth Amendment. Three federal courts of appeals, including the court below, have applied *T.L.O.*'s first prong in this manner to strip searches.

Second, a school's search underneath a child's undergarments is lawful in its scope only when the school has specific information that a sought-after object is hidden in that intimate location. The court below acknowledged this second prong of *T.L.O.*, as applied to a strip search, and the federal government likewise advances this view.

Petitioners' strip search of Savana was unreasonable under both *T.L.O.* prongs. Marissa's

uncorroborated accusation did not indicate that Savana possessed ibuprofen at the time of the search. Moreover, the informant who pointed a finger at Savana was inherently unreliable: a juvenile who committed at least three crimes on campus that morning (distributing the pills at issue, possessing these pills, and bringing weapons onto campus) and who was just caught lying to Wilson (disclaiming any knowledge of the planner that, Wilson knew, was given to Marissa a few days earlier). Without conducting any further investigation into the source of the pills found in Marissa's possession, Petitioners had insufficient suspicion to strip search Savana.

In addition, Marissa's accusation was not sufficiently specific to permit the search of Savana's underwear and the observation of her genital area and breasts. Marissa's vague accusation claimed that Savana possessed ibuprofen at some time in the past and in some unknown location. Nothing in Marissa's uncorroborated accusation, even taken at face value, provided a basis for believing that Savana was concealing ibuprofen inside her panties and bra. Under any plausible Fourth Amendment standard, the strip search of Savana was unlawful.

A. The Fourth Amendment Requires Greater Suspicion of Wrongdoing For a Strip Search To Be Justified At Its Inception Than for the Search of a Student's Backpack.

The *T.L.O.* framework, the rationale behind that opinion, and common sense demand that the

relatively minimal governmental interest that justifies searching a backpack will not suffice to strip a child of her clothing. After all, when a significant weight is placed on one side of the scale—a student's legitimate expectation of privacy in her body—an equal or greater weight must balance on the other side—the school's need to conduct the search—in order for the search to be reasonable.[3]

T.L.O. provides that, "under ordinary circumstances," a school search is justified at its inception when the school possesses reasonable suspicion of wrongdoing. 469 U.S. at 341-42. However, forcing a child to stand naked for observation by her school officials is an extraordinary, not an ordinary, circumstance. Mindful that "reasonableness" is the touchstone of the Fourth Amendment, *id.* at 337, the minimal suspicion to conduct the ordinary search of a backpack is not sufficient to command that a child take off her clothing for school officials to observe her body.

The logic behind *T.L.O.* points in the same direction. *T.L.O.*'s instruction that a child's expectation of privacy must be balanced against the governmental need to conduct a search, *id.*, means that there will be occasions when a school has legally sufficient suspicion to search in locations where a child has a lower expectation of privacy but not in an intimate place where her expectation of privacy is far

---

[3] Respondent's framework does not propose a sliding scale for all searches but rather recognizes that a student strip search is uniquely invasive. School officials must therefore have a stronger factual basis to suspect wrongdoing before ordering a child to remove her clothing.

greater. One side of the Fourth Amendment balance—the child's expectation of privacy—shifts drastically depending on whether the school conducts a mine-run search or a uniquely invasive strip search, since a child has radically different expectations of privacy in her backpack and under her panties.[4]

Recognizing this basic tenet of a balancing test and interpreting *T.L.O.*, the Second, Seventh, and Ninth Circuits have set forth what should be obvious: "as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness." *Cornfield*, 991 F.2d at 1321; *Phaneuf v. Fraikin,*, 448 F.3d 591, 596 (2d Cir.

---

[4] Overlooking the language and logic of *T.L.O.*, the federal government contends that the quantity or quality of evidence needed to search a backpack is no different from that needed to search inside a child's undergarments. To the extent that the government believes that a school may strip search a child based on scarcely plausible evidence, so long as that evidence is location-specific, its position is both erroneous and likely to lead to unjustified strip searches. For instance, assuming *arguendo* that a school could lawfully search the backpack of a student based on a tip from a fellow student with a history of lying and a personal grudge—on the theory that the tip is particularized and provides more than a "hunch" of wrongdoing, *T.L.O.*, 469 U.S. at 346—surely a school may not force the exposure of a child's genitalia based on such dubious evidence, just because the accuser claimed that contraband would be found in the accused student's underwear. *See, e.g., Fewless ex rel. Fewless v. Bd. of Educ. of Wayland Union Sch.*, 208 F. Supp. 2d 806, 816-17 (W.D. Mich. 2002) (holding unlawful a student strip search based on a tip that the student possessed marijuana in his "butt crack," when that tip was apparently motivated by a fellow student's grudge).

2006) ("[T]he reasonableness of the suspicion is informed by the very intrusive nature of a strip search, requiring for its justification a high level of suspicion.") (internal citation omitted); *id.* at 597 ("[A]s the intrusiveness of the search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause, even in the school context.") (quoting *M.M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979) (per curiam)); Pet. App. 18a-19a.

A treatise that provides guidance to school officials, published by the National School Board Association, states this clearly:

> Despite the fact that probable cause is not required in searches by school personnel, the degree of reasonable suspicion necessary to conduct a search does vary with the degree of intrusiveness of the search. . . . Therefore, the standard of Fourth Amendment reasonableness needed to search a locker or a pocketbook may fall short of reasonableness for a strip search.

Ann L. Majestic et al., *Legal and Policy Issues in Curbing Violence in Schools*, *in* Jonathan A. Blumberg et al., Legal Guidelines for Curbing School Violence 2 (National School Board Association Council of School Attorneys 1995). This approach—requiring a lower level of suspicion for mine-run school searches and a relatively higher level of suspicion for seriously invasive searches—is inherent in a balancing test that assesses overall "reasonableness." Virtually every authority on

school law agrees that a strip search requires more than the ordinary level of suspicion for school searches.[5]

Petitioners nonetheless chide this well-accepted approach, labeling it a hopelessly complicated sliding scale, claiming that school searches need not be supported by probable cause, and contending that school officials are ill-equipped to balance legitimate expectations of privacy against suspicion that an object is hidden in a child's underpants or bra. Pet. Br. 28-31. Though school officials need not be hamstrung by the probable-cause standard, *T.L.O.*, 469 U.S. at 341 ("[T]he accommodation of the privacy interests of schoolchildren with the substantial need of

---

[5] *See, e.g.*, Nathan L. Essex, School Law & The Public Schools: A Practical Guide for Educational Leaders 42 (2d Ed. 1999) ("[W]hen a teacher conducts a highly intrusive invasion, such as a strip search, it is reasonable to approach the probable cause requirement."); John S. Aldridge & John A. Wooley, Legal Guidelines for Permissible Student Searches in the Public Schools 19 (1990) (citing *T.L.O.* and noting that strip searches "generally would require a standard approaching the criminal probable cause requirement"). *Cf.* David C. Blickenstaff, *Strip Searches of Public School Students: Can* New Jersey v. T.L.O. *Solve the Problem?*, 99 Dick. L. Rev. 1, 47-48 (1994) (noting that the suspicion necessary to justify a strip search must be greater than the suspicion to conduct other, less invasive searches); Jacqueline A. Stefkovich, *Strip Searching After Williams: Reactions to the Concern for School Safety?*, 93 Ed. L. Rep. 1107, 1110 (1994) (same); Charles W. Avery & Robert J. Simpson, *Search and Seizure: A Risk Assessment Model for Public School Officials*, 16 J.L. & Educ. 403, 409 n. 28 (1987) (same); Larry Bartlett, New Jersey v. T.L.O.: *Not an End to School Search Litigation or Commentaries*, 23 Ed. L. Rep. 801, 807 (1985) (same).

teachers . . . to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause . . . ."), *T.L.O.* provides that, in exchange for authority to conduct searches without clearing the probable-cause hurdle, school authorities must balance governmental interests and privacy intrusions, *id.* at 337. With the privilege of flexibility comes the responsibility to reasonably calibrate the school's interests and children's privacy. Respondent does not argue that Petitioners must have had probable cause to have forced her to disrobe, but she does maintain, consistent with *T.L.O.*, lower courts interpreting *T.L.O.*, and a common sense of human dignity, that school officials were required to have greater suspicion of wrongdoing to strip search her than to search her backpack.

The distinction between strip searches and other searches is clear and simple. Furthermore, this two-tiered framework balances the unique environment of schools with the recognition that strip searches and mine-run school searches occupy entirely different categories of privacy invasion. Finally, school officials can easily understand and administer the principle that a vague, unreliable, and uncorroborated accusation by another student who is already in trouble cannot justify a strip search.[6]

---

[6] This Court has recognized that "reasonable suspicion" is not susceptible of precise definition, *see Ornelas v. United States*, 517 U.S. 690, 695 (1996), but that does not mean it lacks enforceable standards. Petitioners' assertion that the reasonableness of a strip search is entirely divorced from the

Forcing a teenager to strip in front of school officials and to bare her naked body to them seriously violates a young girl's dignity and privacy. Because such searches intrude so heavily upon a legitimate expectation of privacy, the Fourth Amendment requires school officials to have stronger evidence before moving from the search of a student's backpack to a strip search.

B. The Fourth Amendment Requires Suspicion That An Object Is Currently Hidden Beneath Undergarments For a Search Of Those Undergarments To Be Reasonable In Its Scope.

As *amicus curiae*, the United States notes that school officials could have forced Savana to disrobe and bare her genital area and breasts only if they reasonably suspected that a search of her panties and bra would have yielded ibuprofen pills. Br. of *Amicus Curiae* United States 13-17. That much is axiomatic: school officials may search in only those places where they reasonably believe that a sought-after object may be found. This proposition, likewise recognized by the court below, is grounded in *T.L.O.*, blackletter Fourth Amendment jurisprudence, and common sense.

---

invasiveness of a strip search defies logic and common sense. If that were true, then *Terry* frisks would not be limited to pat-down searches. Likewise, under Petitioners' argument, government employers could strip search their employees upon the minimal suspicion of wrongdoing needed to search inside employees' desks. *See O'Connor*, 480 U.S. at 724-25.

This Court stated in *T.L.O.* that "the search" may be reasonable where there are "reasonable grounds for suspecting that [it] will turn up evidence . . . ." 469 U.S. at 342. In a similar vein, *T.L.O.* provides that the scope of a search must be limited by its "objectives," *id.*—in this case, to find pills. A search for pills, according to *T.L.O.*, would be plainly unreasonable in scope when a school official has insufficient suspicion to believe that pills would be found in the searched location. *See also* Pet. App. 29a (noting that a strip search is unreasonable in scope when "no information point[s] to the conclusion that the [sought-after objects] were hidden under [a child's underwear]").

The *T.L.O.* Court's limitation on the location of a search is rooted in basic Fourth Amendment doctrine. In order for a search to comply with the Fourth Amendment, the searching official must have the requisite quantum of suspicion "that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *see also, e.g.*, *United States v. Grubbs*, 547 U.S. 90, 95, 97 (2006); *United States v. Ross*, 456 U.S. 798, 824 (1982) (noting that the lawful scope of a search is confined to the places where an officer reasonably believes the sought-after object will be found). This admonition takes on heightened importance when a person, and not a car or building, is searched. *Houghton*, 526 U.S. at 303. Though the quantum of suspicion varies depending on the context—probable cause in most circumstances and less suspicion in some others—a bedrock demand of the Fourth Amendment is that the searching officer has a

sufficient belief that the place he searches contains the sought-after object.

Petitioners, however, dangerously elide the need for suspicion that an object will be found in the searched location. *See, e.g.*, Pet. Br. i (framing the alleged question presented as whether "a search"—any search—was justified on the record before this Court, whereas Savana's legal claim concerns her strip search and not the search of her bookbag). They apparently believe that when a school official receives a vague, non-specific accusation that a child formerly possessed an ibuprofen pill in some unknown location, the official is presented a blank check to search anywhere and everywhere—from the child's bag to her body to her body cavities. Under Petitioners' logic, there is no stopping point; without any requirement that the school official have reason to believe that a pill is located in the place he searches, the official could order an anal probe, for example, of a child whenever he is provided information that the child previously possessed the pill.

The Fourth Amendment does not countenance such casual disregard for a thirteen-year-old girl's reasonable expectation of privacy in her most intimate body parts. Rather, consistent with *T.L.O.*, myriad other Fourth Amendment cases, and common sense, searches may be reasonable only when the official "reasonably suspect[s] not only that the student possesses contraband but also that it is hidden in a place that such a search will reveal." Br. of *Amicus Curiae* United States 17; *see also* Pet. App. 29a.

C. The Strip Search of Savana Was Unreasonable Both At Its Inception and In Its Scope.

Petitioners' strip search of Savana fails both *T.L.O.* prongs. First, Petitioners did not possess at the time of the strip search sufficient suspicion that Savana was currently engaged in wrongdoing. The school's exclusive justification for the search was an uncorroborated accusation from an unreliable juvenile that Savana previously possessed ibuprofen. The accusation provided minimal, if any, suspicion of current wrongdoing, and, in any event, the common junior-high-school occurrence of tattling on a fellow student, without more, hardly provides sufficient suspicion to execute such an invasive search. Second, Marissa's non-specific accusation did not provide Petitioners with reasonable suspicion that Savana possessed ibuprofen in her panties and bra at the time of the search. Rather, the accusation was remarkably vague in both temporal and spatial detail, as it neither claimed that Savana possessed ibuprofen at the time of the search nor stated that Savana ever concealed ibuprofen in her underwear.

T.L.O.'s two-prong standard is meant to guide an inquiry into the overall "reasonableness" of a school search, so it is no coincidence that an application of the *T.L.O.* framework to the facts of this case yields a common-sense conclusion: Savana should not have had to bare her genital area and breasts to her school officials solely on the vague say-so of another student. Under *T.L.O.* and any conception of reasonableness and dignity, the strip search of Savana was unreasonable.

1. The Strip Search of Savana Was Not Justified at its Inception.

As noted above, school officials should not be permitted to strip search a child with no more suspicion than they need to search her backpack. In this case, however, Petitioners strip searched Savana with remarkably little suspicion that she possessed pills at the time of the search.

Whether government officials possess sufficient suspicion for a search depends on "the content of information possessed by [officials] and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990). Here, the content of the information known to Petitioners at the time of the search was minimal, since Marissa did not state or even imply that Savana presently possessed ibuprofen; and its reliability was dubious, in light of Marissa's many transgressions and history of lying to school officials. Because Petitioners did not conduct any investigation after receiving Marissa's vague, unreliable accusation and before strip searching Savana, their suspicion that Savana was presently engaged in wrongdoing does not approach the suspicion necessary to justify a strip search.

a. Conspicuously absent from Marissa's accusation was any statement that Savana possessed ibuprofen when she was searched. Marissa falsely stated that Savana gave her the ibuprofen and Naprosyn pills, but she did not claim that Savana provided the pills that day, or even that week or month. J.A. 13a; *compare* J.A. 11a (providing that Jordan told the school's vice principal that Marissa "had just given him the pill"). She did not claim that

Savana gave the pills to her on school grounds. J.A. 13a; *compare* J.A. 11a (providing that Jordan told the school's vice principal that Marissa gave pills to him on campus). She did not claim that Savana had provided or was scheming to provide such pills to anyone else. And, perhaps most importantly, she did not claim that Savana currently possessed ibuprofen or Naprosyn. Marissa's accusation hardly provided sufficient suspicion that Savana was engaged in wrongdoing at the time of the search.

b. The vague content of Marissa's accusation did not provide Petitioners with the requisite suspicion to strip search Savana, even if the accuser, Marissa, were reliable. As it turns out, however, just as the "content of information" was lacking, so too was Marissa's reliability.

Marissa was a teenager caught red-handed with pills in violation of school policy. She did what many teenagers would have done in that situation: divert attention to someone else. The fact that Marissa accused someone of being more blameworthy than herself—she alleged that Savana was the distributor of the ibuprofen—does not foreclose the possibility that Marissa provided truthful information, but it certainly casts a pall over her credibility.

This Court has "consistently . . . viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of [trustworthy statements]." *Lilly v. Virginia*, 527 U.S. 116, 133 (1999), *cited in* Pet. App. 22a; *see also, e.g.*, *United States v. Hall*, 113 F.3d 157, 159 (9th Cir. 1997) ("Once a person believes that the

police have sufficient evidence [against him], his statement that another person is more important . . . than he gains little credibility . . . ."). The court below cited *Lilly* and then assessed Marissa's reliability:

> Our concerns are heightened when the informant is a frightened eighth grader caught red-handed by a principal. This is particularly so when the student implicates another who has not previously been tied to the contraband . . . . More succinctly, the self-serving statement of a cornered teenager facing significant punishment does not meet the heavy burden necessary to justify a search accurately described by the Seventh Circuit as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant [and] embarrassing."

Pet. App. 23a (quoting *Mary Beth G.*, 723 F.2d at 1272).

Petitioners do not directly rebut this, but instead focus on (1) their belief that Jordan—not Marissa—was reliable, (2) their assertion that Marissa would be concerned about facing retribution had she provided a false accusation, (3) their assumption that Marissa was not offered leniency in exchange for her accusation, and (4) Marissa's alleged friendship with Savana. Many of these contentions are not in the record, are untrue, and, in any event, merely distract from the overarching concerns about Marissa's reliability: she "offered up"

Savana to divert attention from herself after she had been caught lying to the Assistant Principal and was in trouble for having committed three criminal acts on campus that morning.

First, Jordan's reliability has no bearing on Marissa's reliability. Jordan never linked Savana to pills; only Marissa purported to do so. Moreover, far from bolstering Marissa's credibility, Jordan informed school officials that Marissa engaged in the unlawful conduct of distributing prescription pills on school grounds.

Second, Marissa could not have been concerned about facing additional punishment when the search of Savana produced no evidence because Marissa's accusation was so non-specific—that Savana provided the pills to her at some point in the past—that the school's failure to uncover ibuprofen after searching Savana would not have exposed Marissa to punishment for lying. This is far different from the case that Petitioners cite in support, *C.B. ex rel. Breeding v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996), *see* Pet. Br. 26, where the Eleventh Circuit understandably noted that the student informant in that case might be deemed more reliable because he could have been disciplined had his tip proved incorrect. In *C.B.*, the informant told a school official that C.B. was planning on selling drugs that day and that C.B. was currently concealing drugs under his large jacket. 82 F.3d at 385. Unlike in the present case, where a fruitless search would not have disproved the accusation provided to Wilson, a fruitless search of C.B. would have suggested that the informant in that case had lied.

Third, Petitioners' contention that Marissa was not provided leniency overlooks the dynamic of schoolhouse accusers, is unsupported by the record, and may actually be incorrect. Unlike interactions between criminal suspects and law-enforcement officers, students do not generally plea bargain with school officials in exchange for truthful information. *See* Pet. Br. 30 ("Nor are school officials in the practice or habit of cutting deals with students in which leniency is exchanged for information that allows officials to pursue other students . . . ."). Rather, they hope that the school officials' attention is diverted to someone else, which in fact occurred here. Upon Marissa's accusing Savana, school officials cut short their questioning of Marissa and escorted her from Wilson's office so that Wilson could retrieve Savana from her class. J.A. 13a. Marissa was then searched less invasively than Savana. J.A. 16a (noting that Petitioners forced Savana, but not Marissa, to take off her shirt).

Finally, Petitioners go to great lengths to attack Savana and to note that Savana had shared things, but not pills or other drugs, with Marissa in the past, suggesting a friendship between the two. This contention, however, is neither true nor particularly relevant to Marissa's reliability. Had Wilson questioned either Savana or Marissa about their relationship, he would have learned that they were no longer friends. That aside, Wilson was aware of key pieces of evidence that should have dismantled his belief in the reliability of Marissa's accusation: Marissa had been caught committing three illegal acts that day (distributing pills,

possessing pills, and bringing weapons to school), and Marissa already had lied to Wilson that morning (when she disclaimed any knowledge of the planner found next to her in class). *Compare* J.A. 13a (Wilson's acknowledging that Marissa "denied knowing anything about [the planner and its contents]"), *with* J.A. 14a (Wilson's acknowledging that Savana told him that she lent the planner, but not its contents, to Marissa days earlier). Just as an informant's tip is often considered more reliable once the informant is believed to have provided truthful information in the past, *see, e.g.*, *Gates*, 462 U.S. at 244, an informant's reliability is dubious once she is suspected of outright lying to the government official just before providing her tip.

On the spectrum of informant reliability, Marissa is well below average. She was a teenager in trouble, who was attempting to divert the Vice Principal's attention away from herself, who was caught committing three separate criminal acts that morning, and who was just revealed as a liar to this school official. Combining Marissa's unreliability with the dearth of information that Savana was concealing ibuprofen at the time of the search, Petitioners lacked the requisite suspicion to strip search Savana.

c. After receiving a vague accusation from an unreliable informant, Petitioners' failure to conduct any additional investigation before strip searching Savana ensured that they would not possess sufficient suspicion of her wrongdoing. Although further investigation potentially could have yielded facts providing Petitioners with sufficient suspicion

of wrongdoing, the officials unreasonably jumped to a strip search of Savana and asked questions only later.

The lower courts have recognized the necessity for school officials to conduct further investigation before strip searching children based solely on juvenile-informants' tips. There are relatively few cases where courts have upheld the constitutionality of strip searches based initially on informants' tips, and in virtually all of them the courts noted the importance of the school officials' having corroborated the tips prior to executing the invasive searches. In *Cornfield*, for example, the Seventh Circuit upheld a strip search of a student where school officials were initially tipped off about the plaintiff's current drug possession by a student-informant, but, prior to strip searching him, the officials corroborated the tip by first noticing an "unusual bulge in [the student's] crotch area" and then discovering a police report finding that the student had a history of "crotch[ing] drugs."[7] 991 F.2d at 1322. Similarly, in *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 882-83 (6th Cir. 1991), the Sixth Circuit held that a strip search of a student was reasonable where school officials acted on a student-informant's tip of current drug possession only after corroborating the tip by finding a note that

---

[7] Still, the court of appeals found it relevant that the school officials did not force that student to "suffer the indignity of standing naked before them but allowed him to put on a gym uniform while they searched his street clothes." 991 F.2d at 1323. Petitioners did not accord the same respect and dignity to Savana. J.A. 23a-24a.

the student wrote acknowledging her own drug use and by calling the student's father, who confirmed that the student was a habitual drug user. *See also, e.g.*, *Tarter v. Raybuck*, 742 F.2d 977, 979, 980 n.2, 983 (6th Cir. 1984) (upholding strip search of student when school officials corroborated a student-informant's tip of drug possession by personally witnessing the student's engaging in a drug transaction, smelling marijuana on the student's breath, and discovering that the student had a history of smuggling marijuana in his underwear). *Cf. C.B.*, 82 F.3d at 388 (holding that a school search of a student's pocket was reasonable, in part, because the informant's detailed tip that led to the search "received . . . corroboration" by the school officials).

On the other hand, numerous courts have held that strip searches in schools are unconstitutional when they are based on uncorroborated informant tips. The court below joined the Second, Sixth, and Seventh Circuits, in addition to a prior panel of the Ninth Circuit, in holding that strip searches should not be founded solely on an uncorroborated juvenile-informant's allegation. In *Phaneuf*, the Second Circuit held that a strip search of a child was unreasonable, despite a specific tip from a known student that the plaintiff was hiding drugs in her pants, because the school official did not substantiate the tip before ordering the strip search. 448 F.3d at 598-99. The *Phaneuf* court was deeply troubled by the school official's "acceptance of one student's accusatory statement to initiate a highly intrusive search of another student—with no meaningful inquiry or corroboration." *Id* at 598; *see also*

Williams, 936 F.2d at 888-89 ("We can correlate the allegations of a student, implicating a fellow student in unlawful activity, to the case of an informant's tip. While there is concern that students will . . . falsely implicate other students in wrongdoing, . . . school officials would be required to further investigate the matter before [conducting a strip search]."); *Bilbrey ex rel. Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984) (holding that school official who conducted strip search on the basis of an uncorroborated tip of current drug possession is not entitled to qualified immunity); *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980) (same). The case law reflects an important practical understanding: juveniles sometimes act in a juvenile manner—malicious or just reckless to divert attention, they often falsely implicate their peers. Only by corroborating a juvenile-informant's tip prior to employing it to conduct a strip search can school officials ensure that strip searches are not as common as the frequent occurrence of student tattling.

Casting aside common sense and case law, Wilson failed to conduct any investigation before using Marissa's accusation to strip search Savana. Wilson talked with others about the pill situation, but he did so only *after* ordering the fruitless strip search of Savana. *See supra* pp. 5-6. Prior to ordering a strip search of Savana, Wilson did not speak with Savana's mother, any of Savana's teachers, or anyone else to shed light on suspicion of Savana's drug use or possession. *Compare, e.g.*, *Williams*, 936 F.2d at 887 (noting that a school official who received a tip of a student's drug

possession subsequently confirmed the student's drug use, including drug use during school hours, by conversing with the student's father and teacher). Perhaps most importantly, Wilson did not question Marissa to ascertain necessary details: when—today, yesterday, last week—did Savana allegedly provide the pills to Marissa, was Savana still in possession of ibuprofen (or any other pill or drug); and where—in Savana's house, locker, purse, backpack, lunchbox, pencil case, or panties—had she seen Savana possess pills?

Most school officials would have taken all of these investigatory steps. At the very least, any reasonable school official would have pressed Marissa for these obviously crucial details concerning Savana's alleged pill possession prior to ordering the removal of her clothing. *Cf.* Pet. App. 23a-24a ("This need for further investigation is particularly heightened here because the initial tip provided no information as to whether Savana currently possessed ibuprofen pills . . . .").

Petitioners do not contest the importance of corroborating juveniles' tips, but instead claim, contrary to the record, that Wilson did in fact corroborate Marissa's accusation. As ostensible support, they highlight Savana's alleged serving of alcohol months before the strip search and the fact that Marissa placed contraband in the planner that Savana had lent her. Pet. Br. 14-15. However, Savana's purported alcohol serving is disputed, *see* J.A. 26a—and therefore must be discounted entirely, *see Reeves*, 530 U.S. at 150-51—and Marissa's bringing weapons and a cigarette onto school

grounds hardly bolsters her reliability. More importantly, these alleged facts simply do not corroborate the accusation that Savana possessed pills. *See supra* pp. 6-7.

Finally, Petitioners point out that Wilson followed up with Marissa about the items found in the planner. Pet. Br. 25. However, Wilson's asking about the contents of the planner, which did not contain pills, does not bear on whether Wilson inquired about the accusation concerning Savana's alleged possession of pills. Although Wilson could have attempted to shed light on Marissa's vague accusation of Savana's prior pill possession, he did not do so before ordering the strip search of Savana. *See generally* Pet. App. 9a-10a ("[O]n the sole basis of Marissa's attempt to shift the school officials' focus . . . *and without additional questioning or investigation*, Wilson directed his assistant and the school nurse to require a thirteen-year-old to disrobe.") (emphasis added).

Without further investigation—armed with merely a vague accusation from an unreliable juvenile—Petitioners had an insufficient basis for their suspicion of Savana's wrongdoing for a strip search of Savana to have been justified at its inception.

2. *The Strip Search of Savana Was Unreasonable In Its Scope.*

The strip search of Savana was also unreasonable in its scope because Petitioners demanded to search beneath Savana's panties and bra without any specific suspicion that she was

concealing ibuprofen in these intimate locations. As *amicus curiae* United States correctly notes, even if Marissa were an entirely reliable source of information, her accusation was so lacking in spatial and temporal detail that Petitioners could not have reasonably concluded that a search of Savana's panties and bra would turn up ibuprofen. Br. of *Amicus Curiae* United States 20-22.

Marissa's accusation lacked any temporal detail: it did not provide suspicion that Savana possessed ibuprofen or Naprosyn at the time of the search. *See supra* pp. 29-30. The accusation was equally lacking in spatial detail. Marissa did not claim that Savana was hiding ibuprofen or Naprosyn in her panties or bra. She did not claim that Savana ever stored pills against her genitalia. And she did not claim that she or anyone else at the school stored against their genitalia pills that they would later put in their mouths. Marissa's vague accusation did not provide Petitioners with specific suspicion that their search of Savana's panties and bra would yield ibuprofen pills.

This is not to say that students could never conceal pills against their genitalia. However, Marissa's non-specific accusation did not indicate that Savana, an honors student with a clean disciplinary record who had not previously been suspected of storing pills in her crotch (or anywhere else), was concealing pills in her undergarments at the time of the search. *Cf.* Br. of *Amicus Curiae* United States 21 (stating that Wilson reasonably could have searched only Savana's backpack, since

that is "'the obvious place' to find [pills]") (referencing *T.L.O.*, 469 U.S. at 346).

The other potentially relevant information known to Petitioners likewise did not point to Savana's possessing pills in her undergarments:

- Before he ordered the strip search of Savana, Wilson surely was aware that the strip search of Marissa did not uncover any more pills. Perhaps finding other students smuggling pills in their underpants or bras would have heightened Wilson's suspicion that the strip search of Savana would yield contraband. But Marissa was found with pills in her pockets, not against her genitalia or breasts.
- Savana was neither evasive nor obstructive in response to Wilson's questioning or searching her backpack. Her demeanor did not arouse any suspicion.
- The search of Savana's backpack turned up no contraband or other items that could have contributed to suspicion that a strip search would yield evidence of wrongdoing.[8]

All of these pieces of information either (1) did not buttress suspicion that a strip search of Savana would yield pills or (2) affirmatively diminished the suspicion that Savana possessed pills in her panties

---

[8] It is conceivable that other information might have provided sufficient suspicion that Savana was concealing ibuprofen that day in her undergarments. Wilson did not have any other information, however, and he decided not to attempt any further investigation of the situation before ordering the strip search. *See supra* pp. 5-6, 37-38.

and bra. *See also* Pet. App. 29a (holding that the strip search of Savana was unreasonable in its scope because "the most logical places where the pills might have been found had already been searched to no avail, and no information pointed to the conclusion that the pills were hidden under her panties or bra (or that Savana's classmates would be willing to ingest pills previously stored in her underwear)").

This case, therefore, stands in marked contrast to *T.L.O.* There, the vice principal reasonably suspected that T.L.O. violated a school policy prohibiting the smoking of cigarettes in a school bathroom after a teacher reported to him that she had just walked into the bathroom and plainly witnessed T.L.O. and another student smoking. 469 U.S. at 345-46. This tip was clear, specific, and from a faculty member, which warranted the principal's searching for cigarettes in T.L.O.'s "purse[, which] was the obvious place in which to find them." *Id.* at 346.

The search for cigarettes in T.L.O.'s purse led to the finding of rolling papers, which, T.L.O. conceded, "indicated the presence of marihuana" in the purse. *Id.* at 347. Reasonable suspicion of marijuana in the purse, in turn, justified the slightly more invasive search through the rest of the purse. Those searches yielded other drug-related paraphernalia, including a pipe, plastic bags for storing marihuana, and index cards containing information about T.L.O.'s drug-purchasing customers. *Id.* Having discovered documents in T.L.O.'s possession that established her drug

distribution, the school official reasonably extended the scope of the search to read two letters found next to the index cards, which also implicated T.L.O. in drug dealing. *Id.*

In *T.L.O.*, the school official followed a logical progression of searches, each based upon suspicion—borne out by objects found during the earlier searches—that the official would find evidence in the places he searched. Standing diametrically opposed to *T.L.O.* is the strip search of Savana, where the initial report of present wrongdoing was vague, where other facts actually pointed toward Savana's innocence, and where the initial search (of Savana's backpack) provided no further suspicion that a more invasive search would turn up incriminating evidence. *See generally* Pet. App. 29a ("[N]o information pointed to the conclusion that the pills were hidden under her panties or bra . . . .").

The strip search of Savana was unreasonable in its scope. Without suspicion that Savana possessed ibuprofen in her panties and bra at the time of the search, it was unreasonable for Petitioners to have ordered Savana to disrobe and expose her genital area and breasts to school officials.

III. THE COURT OF APPEALS PROPERLY DENIED QUALIFIED IMMUNITY BECAUSE BINDING PRECEDENT AND COMMON SENSE DICTATE THAT IT IS PATENTLY UNREASONABLE TO STRIP SEARCH A THIRTEEN-YEAR-OLD GIRL BASED ON AN UNCORROBORATED ACCUSATION THAT THE GIRL PREVIOUSLY POSSESSED IBUPROFEN IN SOME UNKNOWN LOCATION.

The strip search of Savana, on the record before this Court, was not only unreasonable, but clearly unreasonable. At the time of the search, Ninth Circuit case law, the seminal Arizona state-court opinion interpreting *T.L.O.*, and common sense should have put Wilson on notice that his order to force Savana to disrobe and expose her genital area and breasts was unconstitutional. Any school official should have known not to strip search a child unless, at the very least, there is suspicion that the child currently possesses the sought-after object beneath her undergarments. Accordingly, the court below properly denied qualified immunity to the Petitioner who ordered this traumatizing search.[9]

---

[9] As *amicus curiae* United States correctly points out, if this Court affirms the holding that the strip search violated Savana's rights, it should remand this case regardless of its holding on the qualified-immunity defense. Br. of *Amicus Curiae* United States 29 n.6. Respondent pled a claim under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), against Petitioner Safford Unified School District, who cannot benefit from qualified immunity. The lower courts have not addressed Respondent's *Monell* claim.

1. Qualified immunity is not available to a school official who orders a search that was clearly unreasonable at the time of the search. *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 614 (1999). Officials are denied qualified immunity, even when there is not a case directly on point, if it should have been apparent to a reasonable person in the official's position that the challenged action was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 739, 744-45 (2002); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Binding case law put Wilson on notice at the time of the search that Savana's compelled disrobing was unreasonable. Ninth Circuit precedent had long established that a school official could not strip search a child based on a vague and uncorroborated tip of drug possession. In *Bilbrey*, cited with approval in *T.L.O.*, 469 U.S. at 332 n.2, 342 n.6, a school principal strip searched two fifth-grade students after a school employee reported to the principal that she had just observed the students engage in the exchange of money for objects that she believed to be drugs. 738 F.2d at 1464. Neither search yielded drugs or evidence of drug use, and the students sued for a violation of the Fourth Amendment. *Id.*

A jury found that the searches were unreasonable under both reasonable-suspicion and probable-cause standards, but granted qualified immunity to the officials. *Id.* at 1464-65. The plaintiffs appealed, and the Ninth Circuit reversed the qualified-immunity portion of the judgment, holding that school officials are not entitled to qualified immunity for a strip search of a child when

they act on an uncorroborated, vague tip that a student may possess a drug somewhere in his belongings or on his person. *Id.* at 1467-69. While *Bilbrey* signaled that the school officials could have conducted a mine-run search of the plaintiff-students, the opinion was clear that school officials could not have conducted such a consequential, intrusive search based on the suspicion of wrongdoing they possessed. *Id.* at 1468.

Bilbrey set the standard for strip searches within the Ninth Circuit, and its holding should have put Wilson on notice that his strip-search order was unlawful. There are, to be sure, minor differences between the two cases, but none that works to Petitioners' advantage. For example, the tip in *Bilbrey* came from a trusted school official, not a juvenile, like Marissa, who already was in trouble and who already had lied to her school official. Moreover, the tip in *Bilbrey*, unlike Marissa's accusation, alleged *current* drug possession. The take-home point of *Bilbrey* applies with equal force here: a school official violates the Fourth Amendment when he strip searches a child based on an unsubstantiated accusation that the child possessed a drug somewhere in her belongings or on her person.

Petitioners and their *amici* do not acknowledge *Bilbrey*. Nor do they recognize the seminal Arizona state-court opinion interpreting *T.L.O.*, which, consistent with *Bilbrey*, holds that a school search for drugs is unreasonable where the school official searches a child in a location without sufficient suspicion that the location would contain

the object. *Appeal in Pima County Juvenile Action No. 80484-1*, 733 P.2d 316, 317 (Ariz. Ct. App. 1987) (holding that a principal's search of a student's pockets was unreasonable because the principal "had received no specific reports which would give rise to a reasonable suspicion that the minor's pockets would contain cocaine"). Rather, Petitioners and their *amici* note that (1) some of the lower-court judges who have considered the merits of this case believed that the search did not violate Savana's Fourth Amendment rights; and (2) *T.L.O.* provided a flexible, fact-based standard, and many lower courts have held that school officials should receive qualified immunity when confronted with the facts presented in those particular cases. Neither contention is dispositive here, where binding circuit precedent foreclosed any claim of reasonableness and, in any event, where the challenged strip search, on the record before this Court, was clearly unreasonable.

As for the observation that other judges reviewing this case have reached a different conclusion, neither Petitioners nor their *amici* argue that this is conclusive to the qualified-immunity inquiry, and for good reason. *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551 (2004) (denying qualified immunity to government official where dissenting justices would have held that the challenged conduct was lawful). The judges below who disagreed with eight of the eleven judges of the en banc court on the merits of Savana's constitutional claim incorrectly assumed that a school official can lawfully order a strip search based on a vague accusation of past drug

possession, notwithstanding *Bilbrey*, *T.L.O.*, and a long line of Fourth Amendment jurisprudence stating that an official must reasonably believe that the place he searches is where the sought-after object is stored. *See, e.g.*, Pet. App. 79a (contending that Wilson need not have had reasonable suspicion that pills would be found in Savana's panties in order to compel the observation of her genital area, and instead surmising that the search of her panties would have been unreasonable only if Wilson had affirmative evidence that pills were *not* in Savana's panties), *id.* at 149a-52a (assessing the lawfulness of the scope of the search without considering whether Wilson suspected that Savana was concealing pills beneath her undergarments). Under this logic, Wilson lawfully could have ordered a body-cavity search, too, since there was no affirmative evidence that Savana was not storing the pills inside her vagina or anus. This is not the law, and was not the law at the time that Savana was strip searched. School officials must heed common sense and binding precedent, and both put Wilson on notice that the strip search he ordered was unreasonable.

Petitioners' argument that other courts have had difficulty applying the *T.L.O.* framework to a different set of facts is no more availing. Their argument is akin to maintaining that police officers who use clearly excessive force to subdue a suspect are nonetheless entitled to qualified immunity because what constitutes excessive force on a different set of facts may be less clear. This is the exact opposite of how qualified immunity works, since a court must assess the clear illegality of an

action in light of the specific facts before it. *See, e.g.*, *Hope*, 536 U.S. 730 (denying qualified immunity to prison officials for Eighth Amendment claim).

Other cases may present close calls about whether a student strip search was reasonable. But that possibility does not justify blanket immunity to school officials for all student strip searches and, in any event, this is not one of those cases. Here, Petitioners executed an extraordinarily serious, degrading, and traumatizing search based on nothing more than an unsubstantiated accusation that Savana had at some time in the past possessed ibuprofen in an undisclosed location—perhaps in the medicine cabinet in her bathroom, in her desk drawer in her house, in her purse, in her backpack, in her locker, or somewhere on her person. To jump to the conclusion that Savana was both presently possessing ibuprofen and concealing it against her genitalia and breasts was, at best, pure speculation. *Cf. Renfrow*, 631 F.2d at 93 (holding that a strip search of a thirteen-year-old girl based on an uncorroborated drug-dog alert on the student—indicating that the student possessed a drug currently or at some point in the past—"exceeded the bounds of reason by two and a half country miles") (internal citation omitted). Case law and common sense dictate that school officials cannot execute a life-altering search of a thirteen-year-old girl's body based on only a hunch that the girl presently possesses ibuprofen and a mere guess that the ibuprofen is being stored against her genitalia.

While *Bilbrey* forecloses any claim that the strip search of Savana was reasonable, the

unreasonableness of this traumatizing search is self-evident even without *Bilbrey*. Case law and common sense should have put Wilson on notice that, with the information he possessed at the time, ordering thirteen-year-old Savana to bare her genital area and breasts to her school officials was clearly unreasonable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals, sitting en banc, should be affirmed.

Respectfully submitted,

Adam B. Wolf
Counsel of Record
Graham A. Boyd
M. Allen Hopper
American Civil Liberties
Union Foundation
1101 Pacific Ave., Ste. 333
Santa Cruz, CA 95060
(831) 471-9000

Steven R. Shapiro
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Bruce G. Macdonald
McNamara, Goldsmith,
Jackson & Macdonald, P.C.
1670 E. River Rd., Ste. 200
Tucson, AZ 85718
(520) 624-0126

Andrew J. Petersen
Humphrey & Petersen, P.C.
3861 E. Third St.
Tucson, AZ 85716
(520) 795-1900

Daniel Joseph Pochoda
ACLU of Arizona
P.O. Box 17148
Phoenix, AZ 85011
(602) 773-6003

March 25, 2009

REPLY BRIEF

No. 08-479

IN THE
Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT # 1; KERRY WILSON, husband; JANE DOE WILSON, wife; HELEN ROMERO, wife; JOHN DOE ROMERO, husband; PEGGY SCHWALLIER, wife; JOHN DOE SCHWALLIER, husband,

Petitioners,

v.

APRIL REDDING, legal guardian of minor child,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

MATTHEW W. WRIGHT
Counsel of Record
DAVID K. PAUOLE
HOLM WRIGHT HYDE & HAYS PLC
10429 South 51st Street
Suite 285
Phoenix, AZ 85044
(480) 961-0040

Attorneys for Petitioners

222265

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
I. The Search Was Constitutional.	1
A. The search was justified at its inception.	1
B. The search was reasonable in scope.	5
C. Student privacy remains adequately protected.	11
II. The School Officials Are Certainly Entitled To Qualified Immunity.	12
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases

Bilbrey ex rel. Bilbrey v. Brown,
738 F.2d 1462 (9th Cir. 1984) 13

Brigham City v. Stuart,
547 U.S. 398 (2006) 12

Cornfield ex rel. Lewis v. Consolidated High Sch. Dist. No. 230,
991 F.2d 1316 (7th Cir. 1993) 9

Farmer v. State,
275 S.E.2d 774 (Ga. Ct. App. 1980) 9

Goss v. Lopez,
419 U.S. 565 (1975) 10

Ingraham v. Wright,
430 U.S. 651 (1977) 11, 12

In re A.H.A.,
2008 WL 5423258 (Tex. App. 2008) 9

In re Z.L. v. Jeff L.,
883 N.E.2d 658 (Ill. App. Ct. 2008) 8

Matter of Pima County Juvenile Action,
733 P.2d 316 (Ariz. Ct. App. 1987) 13, 14

Cited Authorities

Page

Neal v. State,
256 S.W.3d 264 (Tex. Crim. App. 2008) 8

New Jersey v. T.L.O.,
469 U.S. 325 (1985) ..... *passim*

Oregon v. Hass,
420 U.S. 714 (1975) 12

Outlaw v. United States,
604 A.2d 873 (D.C. 1992) 8

Phaneuf v. Fraikin,
448 F.3d 591 (2d Cir. 2006) 5, 6

Rone v. Daviess County Bd. of Educ.,
655 S.W.2d 28 (Ky. Ct. App. 1983) 9

Smith v. McGlothlin,
119 F.3d 786 (9th Cir. 1997) 14

State ex rel. Galford v. Mark Anthony B.,
433 S.E.2d 41 (W. Va. 1993) 7, 8, 9

Terry v. Ohio,
392 U.S. 1 (1968) 13

Thompson v. State,
347 So. 2d 1384 (Ala. Crim. App. 1977) 8

Williams ex rel. Williams v. Ellington,
936 F.2d 881 (6th Cir. 1991) 6, 7, 9, 10

Cited Authorities

Page

Constitution

U.S. Const. Amend. IV 5, 7, 12

I. THE SEARCH WAS CONSTITUTIONAL.

Redding continues to talk in circles about the applicable legal standard. On the one hand, she concedes that probable cause was not necessary. Resp. Br. at 24. On the other, she argues that petitioners needed more than just the reasonable suspicion that was necessary to search her backpack. *Id.* Regardless, both sides agree that *T.L.O.* controls the analysis with its twofold inquiry.

A. The search was justified at its inception.

Redding cannot legitimately dispute that a search was justified at its inception with reasonable grounds for suspecting that it would turn up evidence that she was violating Safford's policies that prohibit the nonmedical use or possession of drugs on campus. If she could, she would challenge the search of her backpack. Certain of her *amici* likewise concede the point: "In carrying out its duty to protect the entire student body from the harmful effects of drugs, [the school] justifiably searched [Redding's] backpack." Juv. L. Ctr. *Amicus* Br. at 15.

Having struck out with earlier arguments, Redding does try out a couple new ones in a futile attempt to discredit the grounds for suspecting her of possessing and distributing pills. For example, there is no support for Redding's criticism of Marissa's tip as self-exculpatory because it in no way reduced her guilt. Even if Marissa did get the pills from Redding, she was still caught with them in her possession and had distributed at least one herself to Jordan. J.A. 11a-12a. So Redding takes the new approach of denying the girls' friendship,

perhaps to imply some ulterior motive on Marissa's part. Resp. Br. at 33.

Redding commenced this action nearly five years ago. And right up until just a few weeks ago, she never attempted to contest the claim of her friendship with Marissa. For the most part, she chose instead to remain deafeningly silent on the subject of her relationship with Marissa, even as she denied any friendship with Jordan. J.A. 26a. But on occasion, even she conceded what was already apparent from the facts. In her opening brief before the Ninth Circuit, Redding acknowledged that "[she] was friendly with Marissa and loaned Marissa her planner, because Marissa advised that she wanted to hide cigarettes, a lighter and jewelry from her parents." Appellant's Opening Br. at 19.

Moreover, if Redding really believed that the claim of her friendship with Marissa was a misstatement of fact, then she had an obligation to point that out in her opposition to the petition for writ of certiorari, which she did not do. Supreme Ct. R. 15.2. And so she should not be heard to do so now, particularly when she fails again to offer any support from the record.

Redding also attempts to discredit the grounds for suspecting her of possessing and distributing pills by arguing that Wilson only received a report that she had possessed pills at some point in the past and that he had no basis to believe that she was still in possession of pills at the time of the search. Resp. Br. at 29-30. This is yet another example of what *T.L.O.* described as a "crabbed notion of reasonableness." 469 U.S. at 343.

What Redding glaringly omits is Jordan's report to Wilson, both that the pills were being distributed on campus that morning and that a group of students was planning to take the pills at lunch. J.A. 11a. That coupled with Marissa's direct implication of Redding as the pill supplier led Wilson to believe that Redding was in possession of pills at the time of the search. J.A. 12a-13a.

Accordingly, Redding throws logic out the window in arguing that although Wilson reasonably believed that she had supplied the pills that the group was planning to take that day, he should not have believed that she had kept any for herself (or still had some for continued distribution before lunch) because she had no intention of participating with the group. Not surprisingly, this too is a new argument that Redding never seriously advanced in any of the proceedings below. In fact, she took precisely the opposite position in response to the motion for summary judgment: "It does not make sense that [Redding] gave all of her pills to other students and kept none for herself. If she was the student passing out the pills that morning of October 8, 2003, it is logical that pills would have been found in her possession." Plaintiffs' Opposition to MSJ at 12.

Finally, Redding both misunderstands and mischaracterizes the corroborating evidence regarding the suspicion that she had recently served alcohol to students and the contraband found in her planner immediately before the search. Although the Court should credit her denial that she served and consumed alcohol, that does nothing to change the fact that Wilson

had ample reason to suspect that she had. Redding, Marissa, and their other friends were unusually rowdy the night of the school dance ***and*** smelled of alcohol. J.A. 7a, 10a. Before the dance ended, the school staff found a bottle of liquor and pack of cigarettes in the girls' bathroom. *Id.* And then Jordan confirmed Wilson's suspicion with his voluntary and unsolicited report that Redding had served Jack Daniel's, Black Velvet, vodka, and tequila at a party that she hosted in her family's camper trailer before the dance. J.A. 8a, 11a.

Redding also contends that Wilson knew that the contraband found in her planner was not hers. Resp. Br. at 6. But he knew nothing of the sort. What he did know was that the planner was Redding's, that she had lent it to Marissa a few days earlier, that it was found that morning in the desk next to Marissa, and that it contained the indicated contraband. J.A. 12a-14a, 22a. But with both girls disavowing any knowledge of that contraband, it was still an open question as to who exactly it belonged to, if not both of them. J.A. 13a-14a, 22a.

The relevance of the corroborating evidence is clear to all but Redding. Resp. Br. at 38-39. If she had previously distributed one type of drug—alcohol—to Marissa and others, it was more probable that she was distributing another type of drug—prescription and OTC pills—to Marissa and others. Likewise, Redding's admission that the planner was hers and that she had lent it to Marissa certainly raised a concern that she was involved with Marissa in bringing the planner's contents—knives and lighters, a cigarette, and black permanent marker—onto campus. J.A. 12a, 14a, 22a.

And if she was involved with Marissa in bringing these forms of contraband onto campus, it was more probable that she was involved with Marissa in bringing another form of contraband—prescription and OTC pills—onto campus.

With this corroborating evidence on top of Marissa's direct implication of Redding as the pill supplier, the search was justified at its inception.

B. The search was reasonable in scope.

In arguing that the search was unreasonable in scope, Redding adopts the position articulated by the United States. Resp. Br. at 25-27, 39-43. The federal government submits that before the search in this case could be lawfully conducted, petitioners needed some specific reason to believe that Redding had hidden pills in or under her clothing. U.S. *Amicus* Br. at 14-17, 21-22. Notably, the federal government acknowledges that "this requirement is [actually] a departure from the general Fourth Amendment rule" and is not applicable in any other context. *Id.* at 14-15, 17 n.4.

As a demonstration of how this unprecedented requirement might operate, the federal government applies it to the facts of a recent decision from the Second Circuit. *Id.* at 24. In *Phaneuf v. Fraikin*, the Second Circuit invalidated a search prompted primarily by a disinterested classmate's tip that the plaintiff had marijuana and was planning to hide it down her pants. 448 F.3d 591, 592-93 (2d Cir. 2006). Although the classmate never saw any marijuana, her tip was based on the plaintiff's own statement. *Id.* at 593. During the

ensuing search, school officials required the plaintiff to lift her shirt and pull her bra, drop her skirt to her ankles, and pull her underpants away from her body so that her buttocks could be viewed. *Id.* at 594. No marijuana was found. *Id.* But despite the Second Circuit's conclusion that the search was unlawful, "[t]he [federal] government's approach would lead to a different result in *Phaneuf* because the school officials there could reasonably suspect both that the student possessed contraband and that the contraband was hidden in a location that an order to disrobe would reveal." U.S. *Amicus* Br. at 24.

Of course, the federal government's novel approach would also lead to a different result in other cases as well. For example, in *Williams ex rel. Williams v. Ellington*, the Sixth Circuit upheld a search prompted primarily by a disinterested classmate's tip that the plaintiff was sniffing a white powdery substance in class that she kept in a small, clear glass vial. 936 F.2d 881, 882-83, 887 (6th Cir. 1991). Upon questioning by school officials, the plaintiff's friend produced a small brown vial that contained "rush," a substance that could be purchased over the counter but was illegal to inhale. *Id.* at 882-83. Plaintiff, however, denied possessing any drugs and did not appear disoriented or intoxicated. *Id.* at 883. Still, school officials proceeded to search her locker and purse, which did not turn up any evidence of drug use. *Id.* Next, school officials had her remove her T-shirt and lower her jeans, and pulled on the elastic of her undergarments to see if anything would fall out. *Id.* No drugs were found. *Id.* But notwithstanding the Sixth Circuit's conclusion that the search was lawful, the federal government would decide *Williams* differently

because although the school officials had reason to believe that the plaintiff possessed a drug, the classmate's tip did not provide any indication that the plaintiff had hidden the drug in or under her clothing.

The Sixth Circuit's decision offers a rationale for why the federal government's deviation from the general Fourth Amendment rule is wrong. First and foremost, the suspected nature of the white powdery substance put student health and safety at risk. *Id.* at 887. That concern was further heightened when the plaintiff's friend produced the vial containing "rush." *Id.* Second, the object sought was small. *Id.* Conversely, it is safe to assume that had the school officials searched the plaintiff's underwear for a larger object such as a rifle or bat, the Sixth Circuit would have deemed the search unreasonable in scope. Third, before searching the plaintiff's clothing, the school officials had searched the less intrusive areas of her locker and purse. *Id.*

Implicit in the latter is a point almost too obvious to mention. "[T]he best place to *hide* something is where it is unlikely to be discovered." *State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41, 49 (W. Va. 1993) (Neely, J., dissenting).[1] So while it would be nice if students with

1. In *Mark Anthony B.*, a student stole $100 in cash from a teacher and stuffed it down the back of his underwear. *Id.* at 42-43. The dissent's statement more fully reads:

> Indeed, had the appellant been suspected of stealing an elephant, searching his underwear would have been "unreasonable." But where else would a guilty child hide $100? I suppose that he could have taped

(Cont'd)

contraband chose to leave those objects out in plain view or only "hide" them where they could easily be discovered, this is wishful thinking. And to avoid discovery, students unfortunately do resort to hiding contraband in or under their clothing:

- A 15-year-old girl hid marijuana cigarettes in her bra. *Thompson v. State*, 347 So. 2d 1384, 1385-86 (Ala. Crim. App. 1977).

- A 15-year-old girl hid stolen credit cards in her underwear. *Neal v. State*, 256 S.W.3d 264, 276 (Tex. Crim. App. 2008).

- A juvenile concealed 16 bags of rock cocaine in his underwear. *Outlaw v. United States*, 604 A.2d 873, 874-75 (D.C. 1992).

- A kindergartner is described as "clever about hiding [stolen] things up his sleeve and in his underwear." *In re Z.L. v. Jeff L.*, 883 N.E.2d 658, 671 (Ill. App. Ct. 2008).

(Cont'd)

> the hundred dollar bill to his forehead on the theory that the best place to hide things is in plain view; and, of course, he could have placed it in his desk where a less intrusive search would have easily uncovered it. However, nine out of ten experienced thieves believe that the best place to *hide* something is where it is unlikely to be discovered. If any search is justified, then a search reasonably calculated to discover *hidden* contraband is justified. *Id.* at 19.

- A student hid packages of hand-rolled cigarettes in his underwear. *Farmer v. State*, 275 S.E.2d 774, 775 (Ga. Ct. App. 1980).

- A student hid a bag of marijuana inside the waistband of his pants. *In re A.H.A.*, 2008 WL 5423258 (Tex. App. 2008).

- A student hid stolen money in his underwear. *Mark Anthony B.*, 433 S.E.2d at 42-43.

- A student "crotched" drugs during a raid. *Cornfield ex rel. Lewis v. Consolidated High Sch. Dist. No 230*, 991 F.2d 1316, 1322 (7th Cir. 1993).

As these cases and others demonstrate, "underclothing [is] a prime hiding place for controlled substances" and other contraband. *Rone v. Daviess County Bd. of Educ.*, 655 S.W.2d 28, 29-30 (Ky. Ct. App. 1983) (involving a search of a student for drugs).

As in *Williams*, the suspected infraction of possessing and distributing prescription and OTC pills was one that put student health and safety at risk. And Wilson's concern was similarly heightened by the fact that he did not just suspect that pills were on campus, he confirmed it both by the pill that Jordan gave him and the fistful of pills that he found on Marissa. J.A. 11a-12a. His concern was further heightened by Jordan's report that a group of students was planning to take the pills that day at lunch, the other ominous contraband found in Redding's planner immediately before the search, and the school's history of student

injury from the abuse of pills. J.A. 10a-14a. That history included a near fatality the year prior as well as Jordan's violent episode just days earlier. J.A. 10a-11a.

And as in *Williams*, Wilson first completed the less intrusive search of checking Redding's backpack for pills. J.A. 14a. But students are also known to hide contraband in or under their clothing, and the pills sought were certainly small enough to be discreetly hidden there.

Respectfully, the federal government fails to justify the adoption of an unprecedented constitutional rule that would stunt school officials' discretion even in the most serious situations when they confront imminent threats to student health and safety. Nor do petitioners agree that such a rule is implicit in *T.L.O.*, which speaks explicitly of the problems of "drug use and violent crime in . . . schools" and the attendant need for "flexibility" and "immediate, effective action." 469 U.S. at 339-40 (quoting *Goss v. Lopez*, 419 U.S. 565, 580 (1975)).

Finally, petitioners question the wisdom of an across-the-board rule that may have the effect of further endangering the school environment by actually encouraging students to carry contraband on school campuses. Once students realize that school officials have no discretion to conduct a more intrusive search without some specific reason to believe that the contraband sought is hidden in or under clothing, students will have less cause to be concerned or anxious about being caught. Indeed, in many situations, hiding contraband in or under clothing will afford students a safe harbor even when school officials reasonably believe that the students pos-ess contraband—including drugs and weapons.

C. Student privacy remains adequately protected.

Should the Court reverse the Ninth Circuit's decision, Redding and some of her *amici* seem prepared to forecast the demise of student privacy. They contend that such a result will only invite abuse by giving school officials "a blank check to search anywhere and everywhere" and "a virtual *carte blanche* to conduct strip searches of students." Resp. Br. at 27; Rutherford Inst. *Amicus* Br. at 2. But such exaggerated claims mistake the Fourth Amendment's reasonableness standard and simply have no basis in fact or reality.

To be sure, the reasonableness standard accommodates school officials' substantial interest in maintaining security, discipline, and order on school grounds. *T.L.O.*, 469 U.S. at 338-43. But "[a]t the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.* at 343.

Moreover, school officials and students are not adversaries, and "[t]he attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education." *Id.* at 349-50 (Powell, J., concurring). Indeed, the overwhelming number of educators who enter the profession do so for the chance to make a positive difference in students' lives, despite often limited pay, resources, and appreciation.

Finally, the Court has already recognized that "[t]he openness of the public school and its supervision by the community afford significant safeguards" against

potential abuse. *Ingraham v. Wright*, 430 U.S. 651, 670 (1977). The community's involvement also means that the Fourth Amendment is far from the only legal protection available for students. State and local governments are certainly free, as a matter of their own law, to give greater protection to students than the United States Constitution provides. *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *see also Brigham City v. Stuart*, 547 U.S. 398, 409 (2006) ("Federal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires.") (Stevens, J., concurring). In fact, as most of Redding's *amici* are quick to point out, many state and local governments have already done so through their legislative and policy-making process. Juv. Law Ctr. *Amicus* Br. at 19-21; Nat'l Ass'n of Soc. Workers *Amicus* Br. at 14-16; Urban Just. Ctr. *Amicus* Br. at 37.

With both these legal and non-legal safeguards in place, a search of the type at issue here is a rare occurrence, and one that a school official is only likely to conduct upon a reasonable belief that student health and safety are at risk.

II. THE SCHOOL OFFICIALS ARE CERTAINLY ENTITLED TO QUALIFIED IMMUNITY.

Redding contends that two cases clearly established the law at the time of the search and precluded Wilson from reasonably believing that the search was lawful. Resp. Br. at 44-48. But in denying Wilson qualified immunity, not even the majority below bought this argument as neither case is fairly comparable.

The first is *Bilbrey ex rel. Bilbrey v. Brown*, a Ninth Circuit decision that predates *T.L.O.* 738 F.2d 1462 (9th Cir. 1984). The case involved a search of two fifth-grade students for drugs. *Id.* at 1463. The school officials patted down both boys, searched through their pockets, and had one of the boys undress to his underwear. *Id.* at 1464. The only justification for the search was a bus driver's report that she had seen the boys exchange "something" on the school playground that she was never able to identify. *Id.* And although she suspected that what they had exchanged was drugs, she could not articulate any basis for her suspicion. *Id.* Of course, this is precisely the type of "inchoate and unparticularized suspicion or 'hunch'" that this Court has decried and was nothing more than "the product of a volatile or inventive imagination." *Terry v. Ohio*, 392 U.S. 1, 27-28 (1968). Indeed, the bus driver had no more reason to believe that the boys had exchanged drugs than baseball cards or Twinkies.

In contrast, Marissa did not implicate Redding based only on some vague, unexplainable suspicion or hunch. Nor did she express any doubt whatsoever about exactly what it was that Redding had given to her. Based on actual and personal knowledge, Marissa reported that Redding had given her a fistful of pills, both prescription and OTC. J.A. 12a-13a.

The second case that Redding cites is *Matter of Pima County Juvenile Action*, 733 P.2d 316 (Ariz. Ct. App. 1987). Notably, her rather abbreviated discussion of the case omits mention of the fact that it involved an Arizona student who was caught with cocaine at school after a monitor observed him skipping class outside by

the bleachers, an area of the campus where students were known to smoke cigarettes and use drugs. *Id.* at 316-17. The cocaine was found when school officials simply asked the student to turn out his pockets. *Id.* at 316. The state court, however, suppressed the evidence of the cocaine because the monitor never saw the student engaging in any suspicious activity by the bleachers. *Id.* at 316-17.

But the case did not clearly establish the law for at least two reasons. First, a subsequent Ninth Circuit decision casts considerable doubt on whether the state court even reached the right result. In *Smith v. McGlothlin*, the Ninth Circuit reviewed the search of a student who was seen in an area near the school where students were known to congregate and smoke. 119 F.3d 786, 787 (9th Cir. 1997) (per curiam). Although the school officials had no individualized suspicion that the student had been smoking there, the Ninth Circuit opined that the ensuing search, which uncovered three knives, was reasonable. *Id.* at 788 ("And [the student] herself might have thanked her lucky stars when she got off easy because her juvenile judge misread the law and suppressed the evidence.") (Kozinski, J., concurring). With no meaningful way to distinguish the state-court case from the subsequent Ninth Circuit decision, the state court likely misread the law and reached the wrong result.

Second, even if the state court did reach the right result, the case is still not fairly comparable to this one. In the former, the state court determined that the school officials had no information to suggest that the student was involved in any wrongdoing besides skipping class.

Here, however, petitioners had specific reason to believe that Redding was possessing and distributing prescription and OTC pills.

Tellingly, not one of Redding's *amici* support her position that Wilson should have been denied qualified immunity. In fact, the Rutherford Institute, Goldwater Institute, and Cato Institute take just the opposite view in urging the "need for a controlling decision offering guidance to school officials regarding strip searches." Rutherford Inst. *Amicus* Br. at 23. Such a plea frankly acknowledges that adequate legal guidance is and has been lacking in this area and that Wilson could not have had fair notice that the search was unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit that the search was unconstitutional and that Wilson could not have reasonably believed that the search was lawful.

Respectfully submitted,

MATTHEW W. WRIGHT
Counsel of Record
DAVID K. PAUOLE
HOLM WRIGHT HYDE & HAYS PLC
10429 South 51st Street
Suite 285
Phoenix, AZ 85044
(480) 961-0040

Attorneys for Petitioners

AMICUS CURIAE BRIEF

No. 08-479

In the Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, ET AL.,
PETITIONERS

v.

APRIL REDDING

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record

MICHAEL F. HERTZ
Acting Assistant Attorney General

NEAL KUMAR KATYAL
Deputy Solicitor General

DAVID A. O'NEIL
Assistant to the Solicitor General

LEONARD SCHAITMAN
ROBERT KAMENSHINE
MARK PENNAK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

EDWARD H. JURITH
General Counsel
LINDA V. PRIEBE
Assistant General Counsel
Office of National Drug Control Policy
Washington, D.C. 20503

PHILIP H. ROSENFELT
Deputy General Counsel
STEPHEN H. FREID
MARI COLVIN
Attorneys
Department of Education
Washington, D.C. 20202

(Additional Counsel Listed on Inside Cover)

DANIEL J. DELL'ORTO
Principal Deputy General Counsel
KAREN GROSSO LAMBERT
General Counsel
Department of Defense Education Activity
Department of Defense
Washington, D.C. 20301
LAWRENCE J. JENSEN
Acting Solicitor
EDITH R. BLACKWELL
Associate Solicitor
BRENDA RIEL
Attorney
Department of the Interior
Washington, DC 20240

QUESTIONS PRESENTED

1. Whether public school officials violated the Fourth Amendment by requiring a 13-year-old student to expose her breasts and pelvic area in an effort to find prescription pills they suspected her of possessing in violation of school rules.

2. Whether the school official who ordered the search is entitled to qualified immunity.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument:
I. The court of appeals correctly concluded that the search of respondent violated the Fourth Amendment but applied an erroneous standard in reaching that result 10
A. Targeted searches in the public schools must be supported by reasonable suspicion and, where they are particularly intrusive, must meet specific requirements 10
1. In *T.L.O.*, this Court concluded that the "reasonable suspicion" standard properly accommodates the unique considerations in the public school context 10
2. *T.L.O.* is properly construed to impose two specific limitations on the conduct of a highly intrusive student search 13
B. The search in this case did not satisfy the *T.L.O.* standard because petitioners lacked reasonable suspicion that the contraband was hidden in a location that a strip search would reveal 20
C. The Ninth Circuit's flawed approach creates a Fourth Amendment standard that conflicts with *T.L.O.* and is unacceptably indeterminate 22
II. The school officials are entitled to qualified immunity because the illegality of the search was not clearly established 29
Conclusion 34

TABLE OF AUTHORITIES

Cases: Page

Atwater v. *City of Lago Vista*, 532 U.S. 318 (2001) 2, 7
Beard v. *Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005) 30
Bell v. *Wolfish*, 441 U.S. 520 (1979) 10, 17
Board of Educ. of Indep. Sch. Dist. No. 92 v. *Earls*, 536 U.S. 822 (2002) 2, 11, 19
Brosseau v. *Haugen*, 543 U.S. 194 (2004) 30
Camara v. *Municiple Ct.*, 387 U.S. 523 (1967) 19
Cornfield v. *Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993) 15, 23, 32
Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 15
Flores v. *Meese*, 681 F. Supp. 665 (C.D. Cal. 1988), rev'd on other grounds, 507 U.S. 292 (1993) 15
Ingraham v. *Wright*, 430 U.S. 651 (1977) 29
Jenkins v. *Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir.), cert. denied, 522 U.S. 966 (1997) 31
Michigan v. *Long*, 463 U.S. 1032 (1983) 17
Mo[illegible]ll v. *Department of Soc. Servs.*, 436 U.S. 658 (1978) 29
Morse v. *Frederick*, 127 S. Ct. 2618 (2007) 19, 33
National Treasury Employees Union v. *Von Raab*, 489 U.S. 656 (1989) 12
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985) ..... *passim*
New York v. *Belton*, 453 U.S. 454 (1981) 27
Pearson v. *Callahan*, 129 S. Ct. 808 (2009) 9, 32
Phaneuf v. *Fraikin*, 448 F.3d 591 (2d Cir. 2006) 23, 24

Cases—Continued: Page

Samson v. *California*, 547 U.S. 843 (2006) 17
Savage v. *Glendale Union High Sch.*, 343 F.3d 1036 (9th Cir. 2003), cert. denied, 541 U.S. 1009) (2004) 29
Singleton v. *Board of Educ.*, 894 F. Supp. 389 (D. Kan. 1995) 32
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 12, 17
South Dakota v. *Opperman*, 428 U.S. 364 (1976) 16, 17
Terry v. *Ohio*, 392 U.S. 1 (1968) 10, 12, 13, 24
Thomas v. *Roberts*, 323 F.3d 950 (11th Cir. 2003) 30
United States v. *Cortez*, 449 U.S. 411 (1981) 26
United States v. *Montoya de Hernandez*, 473 U.S. 531 (1985) 27
United States v. *Ross*, 456 U.S. 798 (1982) 15
Vernonia Indep. Sch. Dist. 47J v. *Acton*, 515 U.S. 646 (1995) 2, 11, 17, 19, 28
Widener v. *Frey*, 809 F. Supp. 35 (S.D. Ohio 1992), aff'd, 12 F.3d 215 (6th Cir. 1993) 32
Will v. *Hallock*, 546 U.S. 345 (2006) 30
Williams v. *Ellington*, 936 F.2d 881 (6th Cir. 1991) .. 31, 32
Wilson v. *Layne*, 526 U.S. 603 (1999) 33
Wyman v. *James*, 400 U.S. 309 (1971) 10
Wyoming v. *Houghton*, 526 U.S. 295 (1999) 14, 15

Constitution and statute:

U.S. Const. Amend. IV ..... *passim*
42 U.S.C. 1983 5

In the Supreme Court of the United States

No. 08-479

SAFFORD UNIFIED SCHOOL DISTRICT #1, ET AL.,
PETITIONERS

v.

APRIL REDDING

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case concerns the Fourth Amendment standard applicable to searches of students in public schools and the qualified immunity of school officials who conduct such searches. The United States has a substantial interest in those questions. The federal government has provided billions of dollars to support state and local drug-prevention programs, and the efficacy and credibility of those programs is affected by the manner in which school officials enforce rules against drug possession. The United States also operates hundreds of primary and secondary schools on military installations and Indian reservations. Based on similar interests, the federal government has participated in previous cases addressing the application of the Fourth

Amendment in public schools, including *Board of Education of Independent School District No. 92* v. *Earls*, 536 U.S. 822 (2002), *Vernonia Independent School District, 47J* v. *Acton*, 515 U.S. 646 (1995) (*Vernonia*), and *New Jersey* v. *T.L.O.* 469 U.S. 325 (1985). Finally, the same principles of qualified immunity that apply in suits against state and local officials apply in similar actions against federal officials.

STATEMENT

1. At the time of the events at issue, respondent Savana Redding was a 13-year-old eighth grader at Safford Middle School, a public school in Arizona. Petitioners are Safford Unified School District #1 (SUSD) and various school officials.

a. SUSD has a policy prohibiting the possession of drugs at school. The policy defines "drugs" to include all controlled substances and alcoholic beverages, as well as "[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted." Pet. 4. The school district apparently implemented that ban after a student brought a prescription drug to school and distributed it to classmates, one of whom fell seriously ill. Pet. App. 100a.

b. On October 1, 2003, the mother of Jordan Romero, a student at Safford Middle School, requested a meeting with the school principal and petitioner Kerry Wilson, the assistant principal. During the meeting, Jordan's mother explained that a few nights before, Jordan acted violently toward her and became sick to his stomach. Jordan, who also attended the meeting, claimed that his conduct was caused by pills given to him by a classmate. He also informed the principal and Wilson

that certain students were bringing drugs and weapons to school. Pet. App. 6a.

Jordan proceeded to tell about violations of school rules committed by several students, including respondent. Pet. App. 6a. Jordan did not link respondent to the possession or distribution of pills. Instead, he stated that respondent had served alcohol to classmates at a party she hosted before a school dance earlier that year. *Id.* at 7a, 101a. Wilson had previously heard from school staff members that, at that dance, they had noticed "unusually rowdy behavior" by respondent and her friend Marissa, among a small group of other students, and had also detected the smell of alcohol coming from the group. *Id.* at 5a-6a. Respondent has denied consuming or serving alcohol before the dance. *Id.* at 101a n.2.

c. At the start of the school day on October 8, 2003, Jordan requested another meeting with Wilson. Jordan presented Wilson with a white pill, telling Wilson that Marissa had given it to him and that a group of students planned to ingest similar pills at lunch. Wilson took the pill to the school nurse, petitioner Peggy Schwallier, who identified it as Ibuprofen 400 mg, a prescription medication. Pet. App. 7a.

Based on this information, Wilson went to Marissa's classroom and asked her to gather her belongings. As Marissa complied, Wilson noticed a black planner on an adjacent desk. After discovering that the planner contained several knives, lighters, a cigarette, and a permanent marker, Wilson took it with him and escorted Marissa to his office. Pet. App. 7a-8a; *id.* at 131a.

Wilson asked his administrative assistant, petitioner Helen Romero, to witness while he had Marissa empty her pockets and open her wallet. The search produced a razor blade, several Ibuprofen 400 mg pills, and one

blue pill containing Naprosyn 200 mg, an over-the-counter pain drug. When Wilson asked Marissa where she had obtained the blue pill, Marissa responded "I guess it slipped in when *she* gave me the IBU 400s." Wilson asked who "she" was, and Marissa replied, "Savana Redding." Marissa denied knowing anything about the planner or the contraband inside. Pet. App. 131a.

After Wilson finished questioning Marissa, he instructed Romero to take her to the nurse's office to search her clothing and undergarments for more pills. Nothing was found during that search. Pet. App. 8a-9a.

d. Wilson then retrieved respondent from class and began questioning her in his office. Respondent denied any knowledge of the contents of the planner but admitted that she had loaned it to Marissa a few days earlier to help Marissa hide items from her parents. Pet. App. 3a-4a & n.2. When asked about the pills, respondent said that she knew nothing about them and had never carried or distributed pills at school. Wilson asked respondent if she would submit to a search of her belongings, and she agreed. With Romero witnessing, Wilson searched respondent's backpack. That search proved fruitless. Wilson then asked Romero to take respondent to the nurse's office and search her clothes. *Id.* at 4a-5a.

In the nurse's office, Romero told respondent to remove her jacket, socks, and shoes. When Schwallier entered, Romero directed respondent to remove her pants and shirt. Romero and Schwallier then instructed respondent to pull her bra out and to the side and shake it, exposing her breasts, and to pull out her underwear and shake it, exposing her pelvic area. Respondent later testified that she felt humiliated during the search and that she kept her head down so that the school officials would not see that she was about to cry. Pet. App. 5a, 134a.

The search revealed no pills. Pet. App. 5a.

After the search, respondent was directed to sit outside Wilson's office for over two hours before she was permitted to return to class. At no point did school officials attempt to contact her mother. Pet. App. 135a, 137a.

2. a. Respondent filed this suit under 42 U.S.C. 1983 alleging a Fourth Amendment violation. Petitioners moved for summary judgment, and the district court, applying this Court's decision in *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985), granted the motion, concluding that the search of respondent was constitutional. Pet. App. 126a-156a.

b. A divided panel of the Ninth Circuit affirmed. Pet. App. 99a-125a. Writing for himself and Judge Hawkins, Judge Clifton concluded that the search did not violate the Fourth Amendment as interpreted in *T.L.O.* *Id.* at 112a-116a. Judge Thomas dissented, reasoning that under that decision the search was excessively intrusive. *Id.* at 117a-125a.

c. The en banc Ninth Circuit vacated the panel decision and reversed the judgment of the district court. Pet. App. 1a-97a. The six-judge majority concluded that the search violated the Fourth Amendment and that petitioner Wilson was not entitled to qualified immunity. *Id.* at 1a-38a.[1] In the court's view, *T.L.O.* requires a "sliding-scale" approach to the constitutional standard necessary to justify a student search. *Id.* at 33a. The court concluded that the "strip search" of respondent failed that standard because it was based only on Marissa's "tip," and "the self-serving statement of a cor-

[1] The court affirmed summary judgment as to petitioners Romero and Schwallier on qualified immunity grounds, reasoning that they merely complied with Wilson's instructions. Pet. App. 37a-38a.

nered teenager facing significant punishment does not meet the heavy burden necessary to justify" such an intrusive measure. *Id.* at 23a.

The majority also reasoned that the search was impermissible in scope. That conclusion was based largely on the court's belief that the infraction petitioners suspected—possession and distribution of prescription-strength ibuprofen on campus—was "minimal" and "pose[d] an imminent danger to no one." Pet. App. 29a, 32a.

Turning to qualified immunity, the court reasoned that the framework set forth in *T.L.O.* put petitioners on notice that the search here was illegal. Pet. App. 34a-35a. The court also concluded that petitioners' conduct was "patently in defiance" of "notions of personal privacy" that are "clearly established" in the Fourth Amendment. *Id.* at 36a-37a. The court therefore held that Wilson was subject to liability. *Id.* at 38a.

Judge Gould, writing for himself and Judge Silverman, dissented on the ground that although the search was unconstitutional, qualified immunity should apply. Pet. App. 39a-41a. In a separate dissent, Judge Hawkins, joined by Judges Kozinski and Bea, concluded that the school officials acted reasonably in searching respondent but in any event the individual petitioners were entitled to qualified immunity. *Id.* at 42a-97a.

SUMMARY OF ARGUMENT

The search of respondent violated the Fourth Amendment. Nonetheless, the school officials are entitled to qualified immunity because the law was unclear at the time they acted.

I. A. In *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985), this Court adopted a "two-fold inquiry" for evaluating

the validity under the Fourth Amendment of a search prompted by a student's suspected wrongdoing. Under that inquiry, which is based on the standard of reasonable suspicion, the search must be both "justified at its inception" and "permissible in its scope." A search will generally satisfy that test when there are reasonable grounds to suspect the student of possessing contraband and "the measures adopted are reasonably related to the objectives of the search." *Id.* at 341-342 & n.9.

T.L.O. also instructed that the search must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S. at 342. That instruction reflects the special concerns implicated by intrusive searches of schoolchildren, who are uniquely sensitive about bodily privacy. *T.L.O.* thus implies two additional limitations on the conduct of strip searches in the school context.

First, school officials may not order a strip search unless they reasonably suspect that the student is hiding contraband in a place that such a search will reveal. That rule does not require any heightened *level* of justification beyond reasonable suspicion as to whether the student possesses contraband. Rather, it requires that the school officials' reasonable suspicion extends to the contraband's *location*.

Second, a particularly intrusive search is permissible only to address an infraction posing an immediate risk to health or safety. In determining what infractions pose such a risk, however, courts should defer to school officials, who are in a better position to identify any dangers to the school community. Thus, where contraband is barred by a school rule or policy based on an immediate health or safety risk, courts should not second-guess

the wisdom or necessity of that rule as a justification for an intrusive search.

B. Under *T.L.O.*, the search violated the Fourth Amendment. Some search of respondent was "justified at its inception" because the school officials reasonably suspected that she possessed prescription pills in violation of school rules. The circumstances the school officials confronted, however, did not furnish reasonable suspicion that respondent was hiding those pills in her underwear or on her naked body. Absent such particularized suspicion about the location of the pills, the search was "excessively intrusive" and thus impermissible in scope.

C. Although the court of appeals correctly held that the search was unconstitutional, it erred in its formulation of the Fourth Amendment framework in two respects. First, the court adopted what it called a "sliding-scale" approach to the showing necessary to justify a search. Unlike the government's proposed rule, which requires only a showing of reasonable suspicion, the Ninth Circuit's approach imposes an increasingly demanding standard with respect to whether the student possesses contraband as the intrusiveness of the search intensifies. That approach effectively culminates in a requirement of probable cause, if not a heavier burden. Second, the court improperly substituted its own judgment for that of the school officials, as reflected in a written school rule, about whether banning possession of the pills at issue was necessary to prevent immediate risks to health or safety.

Both of those conclusions conflict with *T.L.O.*, and together they create a highly indeterminate standard that would prove difficult for school officials to apply. In contrast, a consistent reasonable suspicion standard that

requires more specific justification for conducting a more intrusive physical search and that respects a school's identification of immediate health and safety risks accords with the balance the Court struck in *T.L.O.* and also provides school officials clear guidance. There is no reason to assume that school officials will use their discretion to engage in unnecessarily intrusive searches under that standard. School administrators are subject to intense public scrutiny, and they have powerful incentives independent of the Fourth Amendment to refrain from such conduct.

II. The school officials are entitled to qualified immunity because the illegality of the search was not clearly established. The Ninth Circuit erred in concluding that *T.L.O.*, by itself, dictated the conclusion that the search at issue violated the Fourth Amendment. As other courts have repeatedly recognized, *T.L.O.*'s general framework cannot plausibly be read to establish the law applicable to a case such as this with the requisite clarity.

The court of appeals similarly erred in deeming it "self-evident" that petitioners' conduct violated basic principles of privacy inherent in the Fourth Amendment. The court failed even to acknowledge the existence of prior lower court decisions upholding similar searches. Petitioners were "entitled to rely on [those] existing lower court cases without facing personal liability for their actions." *Pearson* v. *Callahan*, 129 S. Ct. 808, 823 (2009). The court of appeals' rationale was particularly inappropriate, moreover, because the constitutional question in this case has sparked sharp disagreement among the federal judges who have considered it.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE SEARCH OF RESPONDENT VIOLATED THE FOURTH AMENDMENT BUT APPLIED AN ERRONEOUS STANDARD IN REACHING THAT RESULT

The court of appeals correctly held that the search in this case was unconstitutional. In reaching its Fourth Amendment holding, however, the court applied a standard that conflicts with *T.L.O.* and fails to provide the clear guidance necessary for school administrators to safeguard within constitutional bounds the students committed to their care.

A. Targeted Searches In The Public Schools Must Be Supported By Reasonable Suspicion And, Where They Are Particularly Intrusive, Must Meet Specific Requirements

1. In T.L.O., *this Court concluded that the "reasonable suspicion" standard properly accommodates the unique considerations in the public school context*

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons * * * against unreasonable searches and seizures." Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979), "the specific content and incidents of this right must be shaped by the context in which it is asserted." *Wyman* v. *James*, 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968)).

This Court has recognized that the public school context is unique for Fourth Amendment purposes. The "substantial need of teachers and administrators for

freedom to maintain order in the schools" demands that they have the flexibility to engage in "swift and informal disciplinary procedures." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340-341 (1985). Students, moreover, are subject to "a degree of supervision and control that could not be exercised over free adults," and they "have a lesser expectation of privacy than members of the population generally," *Vernonia*, 515 U.S. at 655, 657 (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)). For those reasons, "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Earls*, 536 U.S. at 829-830.

The unique character of this context has resulted in two distinct Fourth Amendment frameworks. One framework, developed in *Vernonia* and *Earls*, applies to suspicionless searches that are conducted as part of a systematic drug testing program. As to those searches, the requirement of individualized suspicion is "impracticable" and therefore unnecessary; the Fourth Amendment inquiry instead turns on a balancing of the strength of the governmental interests furthered by the testing program against the intrusion on the subject's legitimate expectation of privacy. See *Earls*, 536 U.S. at 830-838; *Vernonia*, 515 U.S. at 654-664. That standard is inapplicable here because the search of respondent was not undertaken pursuant to a general program.[2]

---

[2] See Pet. App. 52a n.2 (distinguishing a "*T.L.O.* search," where school officials target a particular student based on a suspected infraction, from an "'*Acton* search[,]' in which school officials conduct a systematic search without any individualized suspicion" of wrongdoing, and noting that the two categories of searches should be governed by distinct standards). The *Vernonia*/*Earls* doctrine draws on decisions

Because this case concerns a search based on individualized suspicion of wrongdoing, it is governed by the separate framework set forth in *New Jersey v. T.L.O.* In that case, this Court concluded that the "school setting * * * requires some modification of the level of suspicion of illicit activity needed to justify [a targeted student] search." 469 U.S. at 340. In particular, the Court rejected the traditional "probable cause" requirement on the ground that it fails to accommodate the particular privacy interests of schoolchildren and "the substantial need" of school administrators for flexibility in preserving order. *Id.* at 341.

In place of that requirement, this Court adopted a "two-fold inquiry" based on the reasonable suspicion standard of *Terry* v. *Ohio*. *T.L.O.*, 469 U.S. at 341. "[F]irst, one must consider 'whether the . . . action was justified at its inception[;]' second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Ibid.* (internal citation omitted) (quoting *Terry*, 392 U.S. at 20). A search generally will be "justified at its inception" when "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the

---

applying the "special needs" exception to drug testing programs for employees seeking safety-sensitive positions in regulated industries. See *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989). Under that framework, as in *Vernonia* and *Earls*, individualized suspicion as to any aspect of the search is unnecessary. *Von Raab*, 489 U.S. at 665 (noting that in that context, the Fourth Amendment does not require "any measure of individualized suspicion"); *Skinner*, 489 U.S. at 633.

school." *Id.* at 342. A search will be "permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Ibid.*

2. T.L.O. *is properly construed to impose two specific limitations on the conduct of a highly intrusive student search*

The decision in *T.L.O.* implies two limitations on the circumstances in which school officials may conduct the type of "strip search" at issue in this case.[3] First, although school officials need not possess any higher level of suspicion for that form of distinctly intrusive search, they must possess reasonable suspicion about the location where the contraband is hidden. A strip search in the public schools is therefore permissible only if there is reasonable suspicion both that the student possesses contraband and that such a search will reveal it. Second, *T.L.O.* limits strip searches to the category of infractions that implicate rules designed to prevent immediate risks to health or safety.

1. School officials may initiate a search of a student consistent with *T.L.O.* if they are aware of "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] in-

---

[3] The label "strip search" can cover a number of types of searches that vary in their intrusiveness. The search here consisted of a command to remove all of the student's clothes and to lift her undergarments for visual inspection in a private room under observation by school officials of the same gender. However it is labeled, the name of the search does not control or inform the Fourth Amendment analysis. See *Stanley* v. *Henson*, 337 F.3d 961, 964 (7th Cir. 2003) ("Whether we further label this process a 'strip search' or merely a 'search' is unimportant, as the analysis remains the same.").

trusion." *Terry*, 392 U.S. at 21. When such facts exist, the search is "justified at its inception," because, in the language of *T.L.O.*, there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." 469 U.S. at 342.

In general, the information giving rise to reasonable suspicion will also determine the permissible scope of the search. That information will define the "objectives of the search" and thus guide the inquiry whether "the measures adopted are reasonably related" to achieving those ends. *T.L.O.*, 469 U.S. at 342. For example, where school officials suspect the student of possessing a large weapon such as a baseball bat, they would act reasonably in searching for it in the student's locker but not in his pockets. See Pet. App. 73a; *T.L.O*, 469 U.S. at 346 (noting that a school official acted reasonably in searching for cigarettes in a student's purse, which "was the obvious place in which to find them"). A targeted search will thus typically satisfy the Fourth Amendment when it is based on reasonable suspicion and directed at places where school officials, exercising "reason and common sense," might expect to find the contraband. *Id.* at 343.

2. *T.L.O* also cautions that a search must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S. at 342. That caveat assumes particular significance where, as in this case, school officials conduct a search requiring a student to expose private parts of his or her body. That caveat also contemplates a departure from the general rule of the Fourth Amendment, which, consistent with the first portion of *T.L.O.*'s "permissible scope" test, defines the valid reach of the search by its object "and the places * * * [where the object] may be found."

Wyoming v. *Houghton*, 526 U.S. 295, 302 (1999) (quoting *United States* v. *Ross*, 456 U.S. 798, 824 (1982)). Under that basic rule, officers conducting a justified search may examine locations reasonably likely to contain the contraband "without a showing of individualized [suspicion] for each one." *Ibid.*

In the unique context of public schools, however, *T.L.O.* recognized that particularly intrusive searches raise special concerns. Adolescents are at "a time and condition of life when [they] may be most susceptible to influence and to psychological damage." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982). Requiring such a student to expose to school officials the most private areas of his or her body as part of a targeted search creates a potential for trauma that is not present in other settings. See *Cornfield* v. *Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993) ("[N]o one would seriously dispute that a nude search of a child is traumatic."); *Flores* v. *Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988) ("Children are especially susceptible to possible traumas from strip searches."), rev'd on other grounds, 507 U.S. 292 (1993). For that reason, *T.L.O.* supports a distinction between the kind of search undertaken here and other types of searches that, because they extend only to such areas as the student's outer clothing, pockets, or effects, do not raise similar concerns about intruding on a child's bodily privacy.

a. Two Fourth Amendment limitations, both implicit in *T.L.O.*, flow from that distinction. First, before conducting a strip search, school officials must possess reasonable suspicion that the student is hiding the contraband in a place where such a search will reveal it. This type of search does not require that the evidence of the student's possession of the contraband meet the stan-

dard of probable cause. As with all targeted student searches, the applicable standard remains reasonable suspicion. The requisite reasonable suspicion, however, must extend both to whether the student possesses contraband and to where the contraband may be hidden. Thus, the distinguishing factor in this requirement is not the necessary *level* of suspicion—a conclusion that would conflict with *T.L.O.*, see pp. 23-24, *infra*—but rather the particularity of the suspicion regarding the *location* of the contraband.

That rule is implicit in *T.L.O.* By prohibiting searches that are "excessive" in scope, *T.L.O.* implied a requirement that, when school officials contemplate a particularly intrusive form of search, they must possess some specific need for that measure. At the same time, *T.L.O.* concluded that the requirement of reasonable suspicion correctly accommodates the various considerations in the school context and that the "the public interest is best served by a Fourth Amendment standard * * * that stops short of probable cause." 469 U.S. at 341.

The reasons for those conclusions remain persuasive today. A rule that school officials must possess probable cause before conducting a search would unduly hinder administrators in taking the "immediate, effective action" necessary to preserve the order and safety of the school community. *T.L.O.*, 469 U.S. at 339. Such a rule would also require "teachers and school administrators * * * [to] schoo[l] themselves in the niceties of probable cause," *id.* at 343, a legal standard that is "peculiarly related to criminal investigations, not routine, non-criminal procedures," *South Dakota* v. *Opperman*, 428 U.S. 364, 370 n.5 (1976). See *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring in the judgment) ("A teacher has

neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause."). Those burdens would divert school officials from their principal mission, which is "teaching and helping students, [not] developing evidence against a particular troublemaker." *Ibid.*

Rather than depart from *T.L.O.* by requiring the more exacting and problematic standard of probable cause for intrusive searches, this Court should adhere to the reasonable suspicion standard but extend it to the contraband's location. Under that rule, strip searches are impermissible in the public schools unless the officials reasonably suspect not only that the student possesses contraband but also that it is hidden in a place that such a search will reveal. That requirement respects the unique blend of interests in this setting and ensures that school officials do not engage unnecessarily in the type of conduct challenged here.[4]

---

[4] As explained above, see pp. 14-15, *supra*, this requirement is a departure from the general Fourth Amendment rule and is warranted only in this unique context. Particularized suspicion about the location of the contraband is plainly unnecessary in other settings, such as searches conducted in prison, see *Bell* v. *Wolfish*, *supra*; testing of employees who hold or seek to retain safety-sensitive positions in regulated industries, see *Skinner*, 489 U.S. at 619; or frisks conducted for weapons, see, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983). Those situations generally involve adults and implicate wholly dissimilar expectations of privacy. Cf. *Samson* v. *California*, 547 U.S. 843, 852 (2006) (noting the role of diminished expectations of privacy in the reasonableness calculus). Juvenile detention also presents different considerations because any bodily sensitivity in that setting is outweighed by diminished expectations of privacy and by the strong need to preserve security. See *T.L.O.*, 469 U.S. at 339 ("[T]he prisoner and

b. Second, the Fourth Amendment as interpreted in *T.L.O.* limits strip searches to situations involving the violation of certain types of rules. In particular, such searches are an available response only where the infraction at issue implicates a rule intended to prevent immediate risks to the health or safety of students or other members of the school community.

That limitation follows from *T.L.O.*'s instruction that whether a search is "excessively intrusive" depends partly on the "nature of the infraction." 469 U.S. at 342. As the dissent below noted, this Court gave "conflicting directions" about that factor. Pet. App. 75a. Although *T.L.O.* incorporated the "nature of the infraction" in the controlling test, it also disavowed any "standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules" and thus instructed that "courts should, as a general matter, * * * refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not." 469 U.S. at 342 n.9. Those instructions are best construed as permitting consideration only of the "nature" or *category* of the infraction when evaluating the permissibility of particularly intrusive forms of search. *Id.* at 342.

The category of infraction that potentially warrants a search of the kind at issue here is that posing an immediate risk to the health or safety of members of the school community. Under the general Fourth Amendment framework *T.L.O.* applied, the permissibility of a

---

the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration."); *Vernonia*, 515 U.S. at 656 ("the nature of [constitutional] rights is what is appropriate for children *in school*") (emphasis added).

particular intrusion depends on "balancing the need to search against the invasion which the search entails." *Camara* v. *Municipal Ct.*, 387 U.S. 523, 537 (1967); *Vernonia*, 515 U.S. at 661 (noting that the governmental interest must be "important enough" to justify the intrusion, though it need not be "compelling"). Infractions posing an immediate health or safety risk trigger the strongest need to search because the "government has a heightened obligation to safeguard students whom it compels to attend school." *T.L.O.*, 469 U.S. at 353; cf. *Earls*, 536 U.S. at 834 (emphasizing the importance to the Fourth Amendment balance of the "immediacy of the government's concerns").

In particular, as this Court has repeatedly emphasized, "drug use and possession of weapons have become increasingly common" in the public schools, and "an immediate response" to those types of infractions is often necessary "to protect the very safety of students and school personnel." *T.L.O.*, 469 U.S. at 352-353 (Blackmun, J., concurring in the judgment); see *Morse* v. *Frederick*, 127 S. Ct. 2618, 2621 (2007) (noting this Court's recognition that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest" and detailing the extent of the threat) (quoting *Vernonia*, 515 U.S. at 661); *Earls*, 536 U.S. at 834 (noting the grave "health and safety risks" posed by drug use in schools).

Although *T.L.O.* permits a categorical distinction among infractions, it also requires deference to the judgment of school officials about whether the particular infraction falls into the health-or-safety category. *T.L.O.* explained that "[t]he promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is

destructive of school order or of a proper educational environment," and the Court therefore directed that "courts should, as a general matter, defer to that judgment." 469 U.S. at 343 n.9 Just as school officials are best suited to determine what rules are necessary to maintain order and discipline, they are also in a far superior position to identify dangers to the school community and to implement rules addressing them. Thus, where the school imposes a rule or policy forbidding particular contraband based on immediate health or safety concerns, courts should not reevaluate that judgment in reliance on their own views of whether the rule is necessary or worthy of enforcement by intrusive search. See *id.* at 342 n.9 (stating that courts may consider the "nature," but not the perceived "trivial[ity]," of the violated rule).

B. The Search In This Case Did Not Satisfy The *T.L.O.* Standard Because Petitioners Lacked Reasonable Suspicion That The Contraband Was Hidden In A Location That A Strip Search Would Reveal

Under the standard articulated above, the search of respondent violated the Fourth Amendment. Although the decision to conduct some form of search was justified at its inception, the search failed the second step of the *T.L.O.* framework because it was "excessively intrusive." 469 U.S. at 342.

1. A search of respondent was justified at its inception because petitioners reasonably suspected that it would "turn up evidence that [respondent] ha[d] violated or [wa]s violating either the law or the rules of the school." *T.L.O.*, 469 U.S. at 342. Petitioner Wilson knew from one student, Jordan Romero, that prescription pills had been distributed at school that day, and he had been

told by another student, Marissa, that respondent was the source. Wilson had a basis to credit Marissa's information about respondent because he could reasonably infer from a number of facts that the two girls were friends. Those facts included reports about the girls' interaction at the school dance as well as respondent's admission just before the search that she had loaned Marissa a planner to help Marissa hide items from her parents. Petitioners therefore possessed reasonable suspicion sufficient to initiate a search.

The information known to petitioners also justified the initial scope of the search. Just as the school official in *T.L.O.* could search a purse for cigarettes because that was the "obvious place" to find them, Wilson could search respondent's backpack and outer garments because pills might reasonably have been hidden there. Indeed, before he searched respondent, Wilson had searched Marissa and found pills in her pockets and wallet, supporting the assumption that if respondent did in fact possess pills, they would likely be in a similar place.

2. The circumstances petitioners confronted, however, did not justify extending the scope of the search to require respondent to disrobe to her bra and underwear and lift them off her body. The "excessive[] intrusive-[ness]" prong of *T.L.O.* required that, before proceeding beyond a search of respondent's effects or outer garments and ordering her to expose those uniquely private areas of her body, petitioners must have possessed reasonable suspicion that the contraband was hidden in a location that such an intrusive measure would reveal. See pp. 15-17, *supra*. That requirement was not satisfied here.

The facts giving rise to reasonable suspicion did not include information indicating that respondent was car-

rying the pills inside her undergarments, attached to her nude body, or anywhere else that a strip search would reveal. Marissa's statement to Wilson did not suggest that respondent was hiding the pills in such a manner. Neither Wilson nor any other petitioner has asserted, and the record does not otherwise indicate, that respondent's friends or students at Safford more broadly engaged in a custom or practice of secreting pills in their underwear.

Indeed, the facts suggested the contrary. Wilson's decision to credit Marissa was warranted in large measure by the inference that the two girls maintained a friendship. The previous search of Marissa, however, had uncovered pills in her wallet and pockets but not in her underwear. Thus, by the time of the search challenged here, Wilson had obtained important information about the practices of at least one student in respondent's peer group, and that information did not suggest that pills would be hidden in the locations Wilson required respondent to expose. Because there was no information supporting a reasonable suspicion that a strip search would reveal the contraband, the search was "excessively intrusive" and therefore impermissible in scope. *T.L.O.*, 469 U.S. at 342.

C. The Ninth Circuit's Flawed Approach Creates A Fourth Amendment Standard That Conflicts With *T.L.O.* And Is Unacceptably Indeterminate

The court of appeals reached the correct conclusion on the merits of respondent's Fourth Amendment challenge. It did so, however, on the basis of reasoning that is flawed in two important respects.

1. a. First, the court of appeals erred in adopting a "sliding-scale" standard that varies depending on the

qualities of the particular search. Pet. App. 33a. The court held that "as the intrusiveness of the search of a student intensifies," the Fourth Amendment requires a progressively higher burden to justify it. *Id.* at 18a (quoting *Cornfield*, 991 F.2d at 1321). Applying that standard, the court reasoned that although Marissa's statement likely provided "reasonable suspicion" sufficient to support a search of respondent's pockets, that statement was too "unreliable" and "self-serving" to "meet the heavy burden necessary to justify" a "highly invasive strip-search." *Id.* at 22a, 23a, 27a. As the court of appeals noted, two other circuits, the Second and Seventh, have adopted a similar "sliding-scale" approach. See *Cornfield*, 991 F.2d at 1321; *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006).

That approach is fundamentally different from the rule, which the government believes is implicit in *T.L.O.* (see pp. 15-17, *supra*), that to justify a search requiring a student to expose private parts of his or her body, school officials must have reasonable suspicion regarding the *location* of the contraband. The standard the government proposes does not require a degree of justification greater than reasonable suspicion about whether the student possesses the contraband. Instead, it adheres to *T.L.O.*'s reasonable suspicion standard and simply extends that requirement, in the context of a search such as that at issue here, to the place where the contraband may be hidden. The "heavy burden" the Ninth Circuit applied, in contrast, would depart from the *T.L.O.* standard by demanding a progressively "high[er] *level* of suspicion" about the student's possession of contraband as the search becomes more intrusive. Pet. App. 19a (emphasis added) (quoting *Phaneuf*, 448 F.3d at 596). At least with respect to some searches, that

floating standard effectively requires probable cause, contrary to *T.L.O.*'s explicit rejection of such a rule. See *T.L.O.*, 469 U.S. at 340-341.

The court of appeals' "sliding-scale" standard would also prohibit searches in situations where the framework of *T.L.O.* permits them. That approach appears categorically to bar a strip search based on information provided by another student, even if that student is deemed trustworthy and specifically indicated where the contraband was hidden. Indeed, the Ninth Circuit cited with approval the Second Circuit's decision in *Phaneuf*, which invalidated such a search that was prompted by a disinterested student's statement "that Phaneuf, a student with a history of disciplinary problems, planned to stuff marijuana down her pants that day to take along with her on the senior class picnic." Pet. App. 27a. The Second Circuit concluded that this information warranted only "additional inquiry and investigation." *Phaneuf*, 448 F.3d at 598.

The government's approach would lead to a different result in *Phaneuf* because the school officials there could reasonably suspect both that the student possessed contraband and that the contraband was hidden in a location that an order to disrobe would reveal. Although the tip may not have furnished probable cause to believe the student possessed the drugs and did not satisfy the "heavy burden" the Ninth Circuit's "sliding scale" required, it was particular as to the location of the drugs and therefore furnished "specific and articulable facts which, together with rational inferences from those facts, reasonably warrant[ed] th[e] intrusion." *Terry*, 392 U.S. at 21.

That result is consistent with *T.L.O.* and the realities of the school setting. Because "[a] single teacher often

must watch over a large number of students," 469 U.S. at 352 (Blackmun, J., concurring in the judgment), school administrators frequently have no choice but to rely on classmates to discover and report threats to health and safety. Beyond discounting any obvious ulterior motive of a fellow student, moreover, it is not clear what "additional inquiry and investigation" a school official could profitably undertake in these circumstances. In any event, a requirement of additional inquiry and a per se rule against reliance on student-provided information to conduct intrusive searches would render impossible the type of "immediate response" that "frequently is required * * * to protect the very safety of students and school personnel." *Id.* at 353.

b. Second, the court of appeals seriously misconstrued *T.L.O.*'s instruction to consider the "nature of the infraction" in determining the permissible scope of the search. Although the court properly focused on whether the infraction posed an immediate risk to health or safety, it erred in failing to defer to the school on that question. Under the correct reading of *T.L.O.*, see pp. 19-20, *supra*, the school's promulgation of a health-or-safety rule reflects its judgment that violations of the rule represent a danger to the school community, and courts should not second-guess that determination. The court of appeals, however, essentially ignored the SUSD rule against possession of the prescription medication in this case. Rather than defer on that point, the court invalidated the search based on its own belief that, even though it violated school rules, possession or distribution of these particular pills "pose[d] an imminent danger to no one" and constituted only a "minimal" infraction. Pet. App. 29a; see *id.* at 32a (rejecting "any suggestion that finding the ibuprofen was an urgent matter

to avoid a parade of horribles"). The court of appeals thus engaged in precisely the sort of analysis *T.L.O.* prohibits. See 469 U.S. at 342 n.9 (rejecting the dissent's reliance on its perception that the school rule was "trivial").[5]

3. The two flawed aspects of the court of appeals' *T.L.O.* analysis combine to create a Fourth Amendment framework that would be highly problematic for school officials to administer. Under the Ninth Circuit's decision, a school official facing a situation potentially fraught with risk and contemplating a search may not simply ask, consistent with *T.L.O.*, whether there is a "particularized and objective basis for suspecting" that

---

[5] The facts of this case illustrate the pitfalls in the Ninth Circuit's approach. Possession of pills, even those that may appear harmless, can pose any number of dangers that school officials may reasonably fear at the time immediate action is necessary and that may seem remote to a court viewing the events in hindsight. Many illegal drugs, such as ecstasy, come in pill form, and it is often difficult to distinguish those pills from legitimate medication. Conversely, a number of prescription pills that can be possessed for legitimate reasons, such as Ritalin, present the same risks as illegal drugs if used improperly. School officials, who generally lack training in pharmacology, must therefore take seriously any information they receive about the possession of unauthorized pills. They cannot be expected to conduct a laboratory or toxicity test in each case where the nature of the pill is unknown. Even when the school officials know the type of pill they suspect a student of possessing, moreover, they reasonably may perceive serious risks to heath and safety if that medication yields an adverse reaction or is taken with a contraindicated drug either by the student who possesses it or by other students to whom it may be distributed. Indeed, the school's policy against un authorized possession of medication appears to have been adopted in response to a near-fatality resulting from ingestion of pills. See Pet. App. 100a. Finally, the rule against such medication serves an important deterrent purpose, warning students against bringing any pills to school.

the search will yield contraband. *United States* v. *Cortez*, 449 U.S. 411, 417 (1981). The official must instead evaluate each progressive interference with a student's privacy interests to determine the "intensi[ty]" of the intrusion it entails, anticipate a future judicial "sliding-scale" inquiry, and then calibrate accordingly the "level of suspicion" necessary to justify the search under the Ninth Circuit's variable standard. Pet. App. 18a-19a. And even if the official could resolve that inquiry with confidence, he must factor into the mix another variable in the "sliding scale": whether a court will later agree with his judgment that, in the particular circumstances, the violation of a valid health or safety rule presents an "immediate danger." *Id.* at 32a.

That indeterminate framework fails to heed the strong preference in this Court's Fourth Amendment jurisprudence for "standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after [a] * * * search is made." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001); see *New York* v. *Belton*, 453 U.S. 454, 458 (1981) (Fourth Amendment rules "ought to be expressed in terms that are readily applicable") (citation omitted). On that principle, this Court has rejected standards that, like the "sliding-scale" test the court of appeals adopted, rest on "subtle * * * gradations" of the Fourth Amendment showing "in addition to 'reasonable suspicion' and 'probable cause.'" *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 540-541 (1985) (concluding that such a standard would "obscure rather than elucidate the meaning of the provision in question").

The need for a clear, consistent, and easily applied rule is particularly compelling in the school context.

Teachers and school administrators are not law enforcement officers, and a multi-variable test that shifted depending upon the circumstances of each search would require them to discharge "a task for which they are ill prepared, and which is not readily compatible with their vocation." *Vernonia*, 515 U.S. at 664. Indeed, it was precisely those considerations that prompted this Court in *T.L.O.* to reject a requirement of probable cause. 469 U.S. 343 (reasoning that adoption of the "reasonable suspicion" standard "will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense").

4. The standard the government believes is implicit in *T.L.O.* not only adheres to the balance this Court has struck but also provides clear guidance. Under that standard, a school official may conduct a search if he reasonably suspects that doing so will uncover evidence of a crime or rule violation. Consistent with the ordinary Fourth Amendment rule, and so long as the student is not required to expose private areas of his or her body, the search generally will be permissible in scope if it targets places where the school official would reasonably expect to find the suspected contraband. The school officials may extend the search beyond the student's outer pockets and other features of clothing if they are responding to the violation of a rule designed to prevent immediate risk to health or safety and they possess particularized suspicion that the contraband is hidden in a location that a strip search will reveal.

There is no reason to assume that school officials will use their discretion to conduct unnecessarily intrusive searches under the standard set forth in this brief. "The

openness of the public school and its supervision by the community afford significant safeguards against" abusive conduct by school officials. *Ingraham* v. *Wright*, 430 U.S. 651, 670 (1977). A large and highly motivated segment of the public—parents with school-age children—will typically become aware of such conduct, can effectively protest practices it regards as unreasonable, and, acting through local school boards, can hold teachers and administrators accountable. Consistent with that influence, school districts in a number of major cities impose stringent limitations on strip searches and at least seven states prohibit them altogether. See Pet. App. 19a n.8. Thus, the type of conduct at issue is effectively addressed through means other than civil suits asserting a federal constitutional violation.

II. THE SCHOOL OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE ILLEGALITY OF THE SEARCH WAS NOT CLEARLY ESTABLISHED

Although the search of respondent violated the Fourth Amendment, the school officials are entitled to qualified immunity because the illegality of the search was not clearly established at the time they conducted it.[6]

1. "Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial is unjustified in the

---

[6] Petitioner SUSD does not enjoy qualified or Eleventh Amendment immunity. See *Savage* v. *Glendale Union High Sch.*, 343 F.3d 1036 (9th Cir. 2003) ("Arizona schools are not agents of the state for Eleventh Amendment purposes."), cert. denied, 541 U.S. 1009 (2004). The liability of SUSD turns instead on the principles set forth in *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978), a matter the lower courts did not address. This Court should therefore remand for further consideration of that issue.

face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was." *Will* v. *Hallock*, 546 U.S. 345, 353 (2006). In determining whether the "law on point" was clear, this Court has repeatedly emphasized that the relevant "law" is that applicable in the "specific context of the case, not as a broad general proposition." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004).

In denying petitioner Wilson qualified immunity, the court of appeals rested principally on the test set forth in *T.L.O.* Pet. App. 34a-35a. But the general *T.L.O.* framework was not sufficiently clear or specific to support the imposition of civil liability in the particular circumstances presented here. As the analysis set forth above demonstrates (see pp. 13-20, *supra*), the application of *T.L.O.* to these facts requires several elaborations that are not clearly articulated in that decision and that entail the reconciliation of apparently "conflicting directions." Pet. App. 75a. Indeed, the Ninth Circuit itself misconstrued *T.L.O.* in important respects. The court of appeals therefore erred in holding that, as of the issuance of *T.L.O.*, "the legal framework was clearly established that would put school officials on notice that a strip search was not a reasonable measure to use on a thirteen-year-old girl accused by an unreliable student informant of having ibuprofen in violation of school rules." *Id.* at 34a-35a. *T.L.O.* cannot plausibly be read to establish the law applicable to such a highly particularized set of facts with the clarity necessary to defeat qualified immunity.

Other courts of appeals have recognized the indeterminacy of *T.L.O.* as applied to circumstances different from those at issue in that case. See *Beard* v. *Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) (ob-

serving that *T.L.O.* "is not 'the kind of clear law' necessary to have clearly established the unlawfulness of the defendants' actions"); *Thomas* v. *Roberts*, 323 F.3d 950, 954 (11th Cir. 2003) ("Defendants could not have compared their situation with the situation in *T.L.O.* and found that the comparison fairly and clearly warned that a 'strip search' of this kind would be unconstitutional."); *Jenkins* v. *Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (11th Cir.) (en banc) ("*T.L.O.* did not attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in *T.L.O.*"), cert. denied, 522 U.S. 966 (1997); *id.* at 825-826 (noting that *T.L.O.* gave "no illustration, indication, or hint as to *how* the enumerated factors might come into play," and listing questions unanswered by *T.L.O.*'s "broadly-worded phrases"); *Williams* v. *Ellington*, 936 F.2d 881, 886 (6th Cir. 1991) (concluding that "the reasonableness standard articulated in [*T.L.O.*] has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be" unconstitutional).

2. The court of appeals also based its denial of qualified immunity on what it deemed the "self-evident" character of petitioners' Fourth Amendment violation. See Pet. App. 36a. Stating that "[c]ommon sense and reason supplement the federal reporters," the Court concluded that the search was so "patently in defiance" of the governing standard that it violated "notions of personal privacy [that] are 'clearly established' in that they inhere in all of us." *Id.* at 35a-36a.

That conclusion was erroneous. The state of lower-court precedent could reasonably have led petitioners to believe that their conduct was not unconstitutional, much less "patently" so. As the dissent below explained,

the Ninth Circuit failed even to acknowledge previous decisions upholding similar searches in analogous circumstances. See *Cornfield*, 991 F.2d at 1323 (upholding the strip-search of a 16-year-old girl suspected of "crotching" drugs); *Williams*, 936 F.2d at 889 (deeming reasonable the strip search of a high school student for unknown drugs); *Singleton* v. *Board of Educ.*, 894 F. Supp. 386, 389, 390-391 (D. Kan. 1995) (upholding search of 13-year-old boy where officials "patted" his crotch, lowered his pants, and "searched the inside waist band of his boxer shorts" to find $150); *Widener* v. *Frye*, 809 F. Supp. 35, 36 (S.D. Ohio 1992) (upholding search in which minor student was required to lift his shirt, lower his pants, and pull his undershorts "tight around his crotch area" to permit visual inspection), aff'd, 12 F.3d 215 (6th Cir. 1993).

Although those decisions may be distinguished on their facts, they defeat any conclusion that the *T.L.O.* analysis should have been "self-evident" to the school officials in these circumstances. Teachers, no less than "[p]olice officers[,] are entitled to rely on existing lower court cases without facing personal liability for their actions." *Pearson* v. *Callahan*, 129 S. Ct. 808, 823 (2009).

The court of appeals' reliance on its own sense of what was "self-evident" was particularly inappropriate, moreover, given the sharp disagreement among the courts and judges below. The court of appeals should not have required school administrators, who are not ordinarily lawyers, to appreciate that a search was "patently" and "self-evident[ly]" unconstitutional where five federal judges—more than one-third of the total number to consider this case—have concluded that it was entirely valid. See Pet. App. 41a ("The [disagreement

among the judges on this case] says something about a lack of clarity in our law."). "If judges thus disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999); see *Morse*, 127 S. Ct. at 2641 (Breyer, J., concurring in part and dissenting in part).

CONCLUSION

The judgment of the court of appeals should be reversed as to petitioner Wilson and remanded for further proceedings as to petitioner SUSD.

Respectfully submitted.

EDWARD H. JURITH
General Counsel
LINDA V. PRIEBE
Assistant General Counsel
Office of National Drug Control Policy

PHILIP H. ROSENFELT
Deputy General Counsel
STEPHEN H. FREID
MARI COLVIN
Attorneys
Department of Education

DANIEL J. DELL'ORTO
Principal Deputy General Counsel
KAREN GROSSO LAMBERT
General Counsel
Department of Defense Education Activity
Department of Defense

LAWRENCE J. JENSEN
Acting Solicitor
EDITH R. BLACKWELL
Associate Solicitor
BRENDA RIEL
Attorney
Department of the Interior

EDWIN S. KNEEDLER
Acting Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
NEAL KUMAR KATYAL
Deputy Solicitor General
DAVID A. O'NEIL
Assistant to the Solicitor General
LEONARD SCHAITMAN
ROBERT KAMENSHINE
MARK PENNAK
Attorneys

MARCH 2009

AMICUS CURIAE BRIEF

No. 08-479

In the Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, *ET AL.*,
Petitioners,
v.
APRIL REDDING,
Respondent

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF JUVENILE LAW CENTER, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Marsha L. Levick
Counsel of Record
Jessica R. Feierman
Riya S. Shah
Sherry E. Orbach
Emily C. Keller
JUVENILE LAW CENTER

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* ix

IDENTITY OF *AMICI CURIAE* ix

STATEMENT OF THE CASE xi

SUMMARY OF ARGUMENT xi

ARGUMENT 1

I. This Court Has Favored Specialized Constitutional Jurisprudence Where Children are Concerned 1

A. Supreme Court Constitutional Jurisprudence is More Protective of Children than Adults 1

B. The Special Treatment of Children under the Constitution Cannot Be Used to Justify Standards that Harm Children's Well-Being 7

II. The Court's Specialized Fourth Amendment Jurisprudence for Children Does Not Justify the Strip Search of Savana 9

A. Strip Searches Are Extremely Intrusive and Traumatic, Especially for Youth 11

i. Case Law and Psychological Research Confirm that Strip Searches Traumatize Youth 11

ii. The Use of Strip Searches on Children Violates International Norms of Dignity and Respect 16

B. The Severe Intrusion and Potential Trauma of a Strip Search Outweigh the Benefit in Discovering Ibuprofen in a Student's Possession 18

CONCLUSION 22

APPENDIX A A1

TABLE OF AUTHORITIES

SUPREME COURT CASES

Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004) 5

Bellotti v. Baird, 443 U.S. 622 (1979) 4

Board of Ed. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002).... .....15, 18

Chandler v. Miller, 620 U.S. 305 (1997) 10, 18

Eddings v. Oklahoma, 455 U.S. 104 (1982)..... 12

Gallegos v. Colorado, 370 U.S. 49 (1962)..... 2

Ginsburg v. New York, 390 U.S. 629 (1968) 5

Haley v. Ohio, 332 U.S. 596 (1948) 2

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)..... 5

Hodgson v. Minnesota, 497 U.S. 417 (1990) 4

In re Gault, 387 U. S. 1 (1967) 2, 3, 7-8

Kent v. United States, 383 U.S. 541 (1966)..... 7

Lee v. Weisman, 505 U.S. 577 (1992) 5, 6

Marsh v. Chambers, 463 U.S. 783 (1983) 6

May v. Anderson, 345 U.S. 528 (1953) 1

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 3, 7

New Jersey v. T.L.O., 469 U.S. 325 (1985).....9, 10, 18

Prince v. Massachusetts, 321 U.S. 158 (1944)..... 5

Roper v. Simmons. 543 U.S. 551 (2005)..... 1-2

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290

(2000) 6

Schall v. Martin, 467 U.S. 253 (1984) 7

Terry v. Ohio, 392 U.S. 1 (1968) 10

U.S. v. Mendenhall, 446 U.S. 544 (1980) 11

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) 9-10, 18

OTHER FEDERAL CASES

Calabretta v. Floyd, 189 F.3d 808, 817-18 (9th Cir. 1999) 8

Chapman v. Nichols, 989 F.2d 393 (10th Cir. 1993) 11

Cornfield v. Consol. High School Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) 10, 12

Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980) 8, 12

Flores v. Meese, 681 F. Supp. 665 (C.D. Cal. 1988), *rev'd on other grounds*, 507 U.S. 292 (1993) 12

Franz v. Lytle, 997 F.2d 784, 791 (10th Cir. 1993) 8

Good v. Dauphin County Soc. Servs. for Children & Youth, 891 F.2d 1087 (3d Cir. 1989) 8

Hunter v. Auger, 672 F.2d 668 (8th Cir.1982) 11

Justice v. Peachtree City, 961 F.2d 188 (11th Cir. 1992) 11

Kenny A. v. Perdue, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) 8

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983) 11

Perez-Funez v. Immigration & Naturalization Service, 619 F. Supp. 656 (C.D. Cal. 1985) 8

Phaneuf v. Fraikin, 448 F.3d 591 (2d Cir.2006).. 8, 10

Roe v. Texas Dep't of Protective & Regulatory Servs., 299 F.3d 395 (5th Cir. 2002) 8

Thomas ex. rel. Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *vacated by* 536 U.S. 953 (2002) 12

Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989) 11

Wood v. Clemons, 89 F.3d 922 (1st Cir. 1996) 11

STATE STATUTES

Cal. Educ. Code §49050 19

Iowa Code § 808A.2(4)(a) 19

Okla. Stat. tit.70, §24-102 19

N.J. Stat. Ann. § 18A:37-6.1 19

S.C. Code Ann. §59-63-1140 19

Wash. Rev. Code § 28A.600.230(3) 19

Wis. Stat. §948.50(2)(b) 19

Wis. Stat. §948.50(3) 19, 20

JOURNALS AND PERIODICALS

Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. Third World L.J. 131 (2006) 16

Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local*

School Boards Can Help Solve the Problem, 70 S. Cal. L. Rev. 921, 929 (1997) 14

Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality and Juvenile Delinquency*, 11 Geo. J. Legal Ethics 509 (1998).... 13

Gary B. Melton, *Minors and Privacy: Are Legal Concepts Compatible?* 62 Neb. L. Rev. 455, 488 (1983)..... 13

Tim Newburn et al., *Race, Crime and Injustice: Strip Search and the Treatment of Suspects in Custody*, 44 Brit. J. Criminology 677, 683-84 (2004)..... 17

Steven F. Shatz, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991)..... 14

Books

Edward Clifford, *Body Satisfaction in Adolescence, in Adolescent Behavior and Society: A Book of Readings* 53 (Rolf E. Muuss ed., 3d ed. 1980)..... 12

Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court (1999)..... 3

Anne C. Peterson & Brandon Taylor, *The Biological Approach to Adolescence: Biological Change and Psychological Adaptation, Handbook of Adolescent Psychology* 144 (Joseph Adelson ed., 1980) 12, 13

William A. Rae, *Common Adolescent-Parent Problems, in Handbook of Clinical Child Psychology* 555 (C. Eugene Walker & Michael C. Roberts, eds., 2d ed. 1992)..... 13

F. Phillip Rice & Kim Gale Dolgin, *The Adolescent: Development, Relationships and Culture* 173 (10th ed. 2002)..... 12-13

Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Perspective on Juvenile Justice* (Thomas Grisso & Robert Schwartz eds., 2000) 3

FOREIGN LAW SOURCES

International Covenant on Civil and Political Rights ("ICCPR") at art. 17, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm..... 16-17

Office of the U.N. High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* 1, 11 (June 9, 2004), *available at* http://www.unhchr.ch/pdf/report.pdf... 17

Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005)..... 16

Y.F. v. Turkey, No. 24209/94, 2003-IX Eur. Ct. H.R. para. 43, *available at* http://cmiskp.echr.coe.int/ 17

MISCELLANEOUS

Arizona School Boards Association, School District Policy Manuals, *available at* http://lp.ctspublish.com/asba/..... 20-22

Assembly Judiciary Committee Statement on Bill No. 1167, 1997 N.J. Assem. c.242 (N.J. 1997)..... 19-20

Adam Liptak, *Strip Search of Girl Tests Limit of School Policy*, N.Y. Times, March 23, 2009, at A1 .. 15

Mesa Public Schools, Selected Policy and Procedure Manuals, *available at* http://www.mpsaz.org/policies/MPSpolicy.pdf..... 21

INTEREST OF *AMICI CURIAE*[1]

The organizations and individuals submitting this brief work with and on behalf of adolescents, particularly young people in the education systems. Some provide services directly to youth, some are engaged in research and some are associations of professionals who work with youth. *Amici* approach the issues in this case from a variety of perspectives – constitutional jurisprudence, psychological research, and international human rights law – but are united in their concern about preserving respondent's civil rights and protecting her well-being. Individualized suspicion alone does not justify the use of the highly intrusive search that was conducted on Savana Redding. *Amici* urge this Court to recognize the important role the Constitution plays in protecting children from the trauma of overly intrusive searches.

IDENTITY OF *AMICI CURIAE*[2]

Juvenile Law Center; Barton Child Law and Policy Clinic; Children & Youth Law Clinic; *Civitas* ChildLaw Center; Education Law Center–PA; Justice for Children Project; Juvenile Rights Advocacy Project; Mid-Atlantic Juvenile Defender Center; National Center for Youth Law; National

---

[1] *Amici* file this brief with the consent of all parties. Letters of consent are on file with Juvenile Law Center and can be furnished upon request. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] A list and brief description of all *amici* appears at Appendix A.

Juvenile Defender Center; Northeast Juvenile Defender Center; Rutgers Urban Legal Clinic; Women's Law Project; Youth Law Center; Professor Barry Feld; Professor Kristin Henning; Professor Wallace Mlyniec.

STATEMENT OF THE CASE

Amici Curiae, Juvenile Law Center, *et al.*, adopt the Statement of the Case set forth by Respondent, April Redding.

SUMMARY OF ARGUMENT

The Court below correctly held that the strip search of Savana Redding was in clear violation of her Fourth Amendment rights. The Court's holding is consistent with a long line of United States Supreme Court cases that take the developmental differences between minors and adults into account in articulating and defining the scope of their constitutional rights. *See* Part I, *infra*. While this Court has recognized that minors' Fourth Amendment rights are not identical to those of adults, it has consistently ensured that children are protected – not harmed – by the Fourth Amendment rules applied to them. Recognizing that children are less mature than adults, this Court has enacted safeguards to protect youth and has cautioned that judges must take extra care in assessing whether purported protective policies or practices toward youth actually promote harm. The Ninth Circuit's ruling below fits squarely within this jurisprudential framework. Although the strictures of the Fourth Amendment may be relaxed where children are concerned, care must be taken to assure that searches conducted under this relaxed standard do not explicitly or implicitly harm children.

Amici recognize that preserving an orderly school environment may entail easing restrictions to which public authorities are traditionally subject.

Unsupported fear of student behavior, however, does not justify an abandonment of Fourth Amendment protections. The use of strip searches is extraordinarily intrusive and contrary to children's fundamental rights to be treated with humanity and dignity. In assessing this case, *amici* urge this Court to take account of case law and psychological research recognizing that strip searches can cause youth ongoing trauma and harm.

Amici urge the Court to affirm the opinion of the Court below, acknowledging the severe intrusion of a strip search and its flagrant unreasonableness in the instant case.

ARGUMENT

I. This Court Has Favored Specialized Constitutional Jurisprudence Where Children are Concerned.

A. Supreme Court Constitutional Jurisprudence is More Protective of Children than Adults.

That minors are "different" is a principle that permeates our law. As Justice Frankfurter so aptly articulated, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, this Court has consistently considered the developmental and social differences of youth in measuring the scope and breadth of minors' constitutional rights.

In both civil and criminal law, youth are treated differently from adults. The distinctive emotional and psychological status of youth was critical to this Court's recent analysis in *Roper v. Simmons*, 543 U.S. 551 (2005), this Court's landmark ruling abolishing the juvenile death penalty. In holding the execution of offenders under the age of eighteen to be a violation of the Eighth Amendment's ban on cruel and unusual punishment, this Court relied on medical, psychological and sociological studies, as well as common experience, which all showed that children under age eighteen are less culpable and

more amenable to rehabilitation than adults who commit similar crimes. *Id.* at 568-76. Echoing the original founders of the juvenile court, this Court in *Simmons* reasoned that because juveniles have reduced culpability, they cannot be subjected to the harshest penalty reserved for the most depraved offenders; punishment for juveniles must be moderated to some degree to reflect their lesser blameworthiness.

In addition to this recent Eighth Amendment jurisprudence, this Court has repeatedly required that governmental power be wielded to protect juveniles in light of their vulnerability. For example, this Court has articulated a legal distinction between minors and adults for the purpose of determining the voluntariness of juvenile confessions during custodial interrogation. This Court has recognized that because minors are generally less mature and more vulnerable to coercive interrogation tactics than adults, they deserve heightened protections under the Constitution. As this Court first recognized in *Haley v. Ohio*, 332 U.S. 596 (1948), in suppressing the statement of a fifteen-year old defendant taken outside of the presence of his parents, a teenager cannot be judged by the more exacting standards applied to adults. This Court also has noted that minors generally lack critical knowledge and experience, and have a lesser capacity to understand, much less exercise, their rights when minors are "made accessible only to the police." *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (finding statement taken from a 14 year-old boy outside of his parent's presence to be involuntary). And in *In re Gault*, 387 U.S. 1, 55 (1967), where this Court extended many

key constitutional due process rights to minors subject to delinquency proceedings in juvenile court, the Court reiterated its earlier concerns about youth's special vulnerability: "the greatest care must be taken to assure that [a minor's] admission was voluntary in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."

This Court's protective stance toward youth in confession cases parallels the Court's stance with respect to other juvenile issues. For example, in declining to extend youth the right to jury trials in juvenile court, this Court specifically noted youth's malleability and developmental status, and sought to promote the well-being of youth by ensuring their ongoing access to rehabilitative, rather than punitive, juvenile justice systems. *See McKeiver v. Pennsylvania,* 403 U.S. 528, 539-40 (1971); *Gault,* 387 U.S. at 15-16. *See also* Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* 92 (1999) (noting that the malleability of youth is central to the rehabilitative model of the juvenile court). This Court's reliance on the developmental characteristics of youth finds ample support in research. Adolescence has been characterized as a period of "tremendous malleability" and "tremendous plasticity in response to features of the environment." *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in* Youth on Trial: A Developmental Perspective on Juvenile Justice 9, 23 (Thomas Grisso and Robert Schwartz eds., 2000).

Decisions analyzing children's rights under other

constitutional provisions likewise reflect this Court's persistent view that children are simply different than adults, and therefore warrant greater protection under the Constitution to ensure their well-being. In a series of cases upholding greater state restrictions on minors' exercise of reproductive choice, the Court found that "during the formative years of childhood and adolescence, minors often lack . . . experience, perspective, and judgment," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979), as well as "the ability to make fully informed choices that take account of both immediate and long-range consequences." *Id.* at 640; *see also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.").

For this reason, the Court has held that states may choose to require that minors consult with their parents before obtaining an abortion. *See Hodgson*, 497 U.S. at 458 (O'Connor, J., concurring in part) (noting that liberty interest of minor deciding to bear child can be limited by parental notice requirement, given that immature minors often lack ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (noting that because minors often lack capacity to make fully informed choices, the state may reasonably determine that parental consent is desirable).

This Court has also adopted a distinctive First Amendment analysis in cases involving children, recognizing that children may require more protection than adults from certain harms under the

First Amendment. In *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), this Court recognized that protecting minors from harmful images on the Internet, due to their immaturity, is a compelling government interest. *Id.* at 661, 683 (Breyer, J., dissenting).[3] Previously in *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), this Court upheld a state statute restricting the sale of obscene material to minors. *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications). Similarly, the Court has upheld a state's right to restrict when a minor can work, on the premise that "[t]he state's authority over children's activities is broader than over the actions of adults." *Prince v. Massachusetts,* 321 U.S. 158, 168 (1944).

These themes are also present in this Court's public school prayer decisions. In holding that prayers delivered by clergy at public high school graduation ceremonies violate the Establishment Clause of the First Amendment, the Court in *Lee v. Weisman*, 505 U.S. 577 (1992), placed great emphasis on the "public pressure, as well as peer pressure," that such state-sanctioned religious practices impose on impressionable students. *Id.* at 593. This Court admonished that "[f]inding no violation under these circumstances would place objectors in the dilemma of participating [in the prayer], with all that implies,

---

[3] The Court split only on whether the Child Online Protection Act used the least restrictive means, consistent with adults' First Amendment freedoms, for achieving that end. *Id.* at 673; 675 (Stevens, J., concurring); 676 (Scalia, J., dissenting); 677 (Breyer, J., dissenting).

or protesting." *Id.* Of particular relevance to this case, the Court stated it was not addressing whether the government could put citizens to such a choice when those "affected . . . are mature adults," rather than "primary and secondary school children," who are "often susceptible to pressure from their peers towards conformity . . . in matters of social convention." *Id.* Similarly, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), this Court held that prayers authorized by a vote of the student body and delivered by a student prior to the start of public high school football games violated the Establishment Clause. The Court stressed "the immense social pressure" on students "to be involved in the extracurricular event that is American high school football." *Id.* at 311. As this Court described it, "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one," *id.* at 312, and, in the high school setting, "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* By contrast, this Court has upheld against an Establishment Clause challenge the delivery of prayers at the start of legislative sessions, where the audience that is present invariably is made up almost exclusively of adults who would not be subject to the same pressures to conform as would youth. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *Lee*, 505 U.S. at 597 (distinguishing between "atmosphere" at legislative sessions and public high schools).

In sum, for more than half a century, this Court has repeatedly distinguished minors from adults

under the law, noting that minors are less mature and more vulnerable than adults, and that laws, policies and practices must be reviewed under the Constitution to ensure they promote youth's well-being.

B. The Special Treatment of Children under the Constitution Cannot Be Used to Justify Standards that Harm Children's Well-Being.

While this Court has made clear that different standards can, and should, be applied to youth, it has also underscored that such differences are tolerated because they protect children's well-being. *See, e.g., Schall v. Martin*, 467 U.S. 253, 265 (1982) (noting that a juvenile's liberty interest may sometimes be subordinated," but only because of the State's interest in "preserving and promoting the welfare of the child")(internal citation omitted); *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (finding that equating the juvenile justice system with the adult criminal justice system ignores "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates"). Indeed, this Court has cautioned against curtailing a child's rights in the name of protectiveness. *Kent v. United States*, 383 U.S. 541, 555 (1966).

In particular, any limitation on a child's right in the criminal or juvenile context should be particularly suspect. In *In re Gault*, this Court cautioned against using the language of child protection in ways that ultimately harm children.

387 U.S. at 16. Thus, the *Gault* Court rejected the argument that depriving children of their constitutional right to due process in the courtroom was justifiable in their best interest.

Lower courts have similarly underscored that the government should not use concepts of child protection in ways that ultimately harm child well-being. *See, e.g., Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005) (holding that "the government's overriding interest is to ensure that a child's safety and well-being are protected" and therefore children must be represented by counsel at termination of parental rights proceedings); *Perez-Funez v. Immigration & Naturalization Service*, 619 F. Supp. 656, 663 (C.D. Cal. 1985) (finding that the "good intentions" of the Immigration and Naturalization Service in implementing a voluntary departure procedure for unaccompanied alien minors were insufficient to forfeit the children's rights as "[d]ue process protects children from placing themselves at the mercy of summary procedures"). And indeed, numerous courts have struck down strip searches of children in schools as overly intrusive and not protective of children's rights.[4]

---

[4] *See, e.g., Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980); *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006). This conclusion has also been reached outside the school context. *Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1092-93 (3d Cir. 1989); *Roe v. Texas Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407-08, (5th Cir. 2002); *Calabretta v. Floyd*, 189 F.3d 808, 817-18 (9th Cir. 1999); *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1993).

II. The Court's Specialized Fourth Amendment Jurisprudence for Children Does Not Justify the Strip Search of Savana.

Amici agree with Respondent that, as set forth in *T.L.O.*, a search of a child's undergarments can only be lawful if (1) it is justified at its inception; and (2) there is specific information that the sought-after object is hidden in that location. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). We further agree that as the search was not justified under either *T.L.O.* prong, it was not constitutional.

We write separately to underscore that the strip search of a child – particularly in the absence of such suspicion – inflicts harm on the child, and that as a result such a search should only be conducted if the benefit from discovering the item outweighs the harm inflicted *upon the child*. It is a basic tenet of Fourth Amendment jurisprudence that "all searches and seizures be reasonable. . . ." *T.L.O.*, 469 U.S. at 340. Moreover, as noted above, this Court has repeatedly cautioned against depriving children of their rights in the name of protection with the actual result of inflicting harm.

Where the requirement of a warrant and probable cause are not appropriate, and therefore not required, courts must balance the need for the particular search against the invasion of personal rights that the search entails. In the school context, whether a particular search meets the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia Sch. Dist. 47J v.*

Acton, 515 U.S. 646, 652-53 (1995) (internal citations omitted). *See also T.L.O.*, 469 U.S. at 337.

In schools search cases, this Court has held that the public interest is best served by a Fourth Amendment standard of reasonableness. *T.L.O.*, 469 U.S. at 341; *Chandler v. Miller*, 520 U.S. 305, 315 (1997). As the intrusive nature of the search intensifies, so too does the standard of Fourth Amendment reasonableness, coming closer to a need to find probable cause. *T.L.O.*, 469 U.S. at 341-42. *See also Terry v. Ohio*, 392 U.S. 1, 18, n. 15 (1968). As the Seventh Circuit has noted, "What may constitute reasonable suspicion for the search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search." *Cornfield v. Consol. High School Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993). The Second Circuit has also sounded a caution about strip searches, noting that the reasonableness of the suspicion is balanced against the very intrusive nature of a strip search, requiring for its justification a "high level of suspicion." *Phaneuf*, 448 F.3d at 596 (holding that a strip search for marijuana was not justified at its inception despite a student tip, a past disciplinary record for the student, the student's response to questions, and the discovery that the student had a pack of cigarettes in violation of school rules) (internal citations omitted).

A. Strip Searches Are Extremely Intrusive and Traumatic, Especially for Youth.

i. Case Law and Psychological Research Confirm that Strip Searches Traumatize Youth.

A strip search is a severe intrusion into personal privacy. *See U.S. v. Mendenhall*, 446 U.S. 544, 574 (1980). Being forced to strip in front of a stranger can be frightening, demeaning and degrading. *See Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996); *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993) (strip searches are "terrifying") (internal citations omitted); *Justice v. Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992) ("The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state...can only be seen as thoroughly degrading and frightening . . . . [S]uch a search upon an individual detained for a lesser offense is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event."); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1446 (9th Cir. 1989) (strip searches produce "feelings of humiliation and degradation"); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission"); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) ("a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience").

Strip searches are perceived as particularly intrusive by children and teenagers. *See, e.g., Cornfield*, 991 F.2d at 1323 (strip search was particularly intrusive for a sixteen-year-old, because that is the "age at which children are extremely self-conscious about their bodies"); *Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980) (strip search of a thirteen-year-old was a "violation of any known principle of human decency"). *See also Thomas ex. rel. Thomas v. Roberts*, 261 F.3d 1160, 1168 (11th Cir. 2001), *vacated by* 536 U.S. 953 (2002) on other grounds (strip searches represented a serious intrusion on the rights of the children). Because "youth . . . is a . . . condition of life when a person may be most susceptible . . . to psychological damage," *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), "[c]hildren are especially susceptible to possible traumas from strip searches." *Flores v. Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988), *rev'd on other grounds*, 507 U.S. 292 (1993).

Research in adolescent development supports the legal conclusion in these cases that strip searches impact young people even more severely than adults. Because adapting to physical maturation is central to the psychological task of adolescence, teenagers tend to be more self-conscious about their bodies than those in other age groups. Anne C. Peterson & Brandon Taylor, *The Biological Approach to Adolescence: Biological Change and Psychological Adaptation*, *Handbook of Adolescent Psychology* 144 (Joseph Adelson ed., 1980); Edward Clifford, *Body Satisfaction in Adolescence, in Adolescent Behavior and Society: A Book of Readings* 53 (Rolf E. Muuss ed., 3d ed. 1980). With the onset of puberty

teenagers begin to view their bodies critically and compare them to those of their peers and their ideals, making adolescents particularly vulnerable to embarrassment. *F. Phillip Rice & Kim Gale Dolgin, The Adolescent: Development, Relationships and Culture* 173 (10th ed. 2002). Surveys confirm a high degree of anxious body preoccupation and dissatisfaction among adolescents. Peterson & Taylor, *infra*, at 144-45. This body criticism is part and parcel of the major task of adolescence: obtaining autonomy from the family and "assum[ing] the role of an adult in society." William A. Rae, *Common Adolescent-Parent Problems, in Handbook of Clinical Child Psychology* 555 (C. Eugene Walker and Michael C. Roberts, eds., 2d ed. 1992).

Accordingly, teenagers have a heightened need for personal privacy. Gary B. Melton, *Minors and Privacy: Are Legal Concepts Compatible?*, 62 Neb. L. Rev. 455, 488 (1983); Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality and Juvenile Delinquency*, 11 Geo. J. Legal Ethics 509 (1998). For an adolescent, privacy is a "marker of independence and self-differentiation." Melton, *supra*, at 488. If the child's privacy is threatened, the resulting stress can seriously undermine the child's self-esteem. *See also* Rae, *infra* at 561 (noting the importance of confidentiality when working with adolescents) and Rice, *infra* at 180 (noting the negative impact of stress upon self-esteem and adolescent development). As the courts have recognized in many cases, including those cited above, strip searches present an extreme threat to bodily privacy.

As a result of these developmental issues, strip searches have a more serious impact on children than on adults; in fact, "a child may well experience a strip search as a form of sexual abuse." Steven F. Shatz, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991).

> Children, even at very early ages, understand the concept that certain parts of their body are 'private.' Child abuse education programs underscore this understanding, telling children: 'No one who is bigger or older than you should look at or touch your private parts, nor should you look at or touch their private parts.' . . . Thus, the strip search—being compelled to expose one's private parts to an adult stranger who is obviously not a medical practitioner—is offensive to the child's natural instincts and training.

Shatz, *supra* at 12-13. Strip searches can seriously traumatize children, leading them to experience years of anxiety, depression, loss of concentration, sleep disturbances, difficulty performing in school, phobic reactions, and lasting emotional scars. See Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. Cal. L. Rev. 921, 929 (1997) (describing lasting and debilitating psychological effects of school's strip search of a student). Consequently, any strip search, no matter the underlying justification, has a debilitating impact on children that clearly does not account for the child's best interests.

A strip search is even more deplorable where, as in the case at bar, it is employed against a minor who has committed no crime and is performed without adequate suspicion that the search would turn up evidence of any wrongdoing. After experiencing the trauma of the strip search, Savana transferred to another school. She also stated that the experience left her wary, nervous and distrustful, and caused her to develop stomach ulcers. Adam Liptak, *Strip Search of Girl Tests Limit of School Policy*, N.Y. Times, March 23, 2009, at A1.

Moreover, the harm of an unjustified search is not only to the individual student, but to the student body as a whole. The school's tutelary obligations to its students requires it to "'teach by example' by avoiding symbolic measures that diminish constitutional protections." *Board of Ed. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 855 (2002). In the case at bar, the school misinterpreted its duty. In carrying out its duty to protect the entire student body from the harmful effects of drugs, it justifiably searched Savana's backpack. However, when it performed the second search—the strip search of her person—school officials overstepped their role, imposing an unreasonably intrusive search that harmed rather than helped a student under their care and sent a message to students that they were not safe in their school.

ii. The Use of Strip Searches on Children Violates International Norms of Dignity and Respect.

While international norms are not dispositive, they point to a global condemnation of the type of strip search Savana experienced.

Most of the human rights instruments addressing strip searches articulate standards for children who are incarcerated or otherwise involved in a juvenile or criminal justice system. This body of international law, which severely restricts the use of strip searches even in secure facilities, underscores the extent to which international law protects children from such harm.

Human rights instruments and case law establish that the unreasonable use of strip searches is degrading and inhumane. The Unaccompanied Alien Child Protection Act prohibits the "unreasonable use" of shackling, handcuffing, solitary confinement, and pat or strip searches, which may violate a child's sense of dignity and respect. *See* Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. Third World L.J. 131 (2006). *See also* Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005). More broadly, the International Covenant on Civil and Political Rights ("ICCPR") states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." International Covenant on Civil and Political Rights ("ICCPR") at art. 17,

opened for signature Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. *See* Office of the U.N. High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* 1, 11 (June 9, 2004), *available at* http://www.unhchr.ch/pdf/report.pdf.

In Turkey, the European Court of Human Rights held that strip searches without medical necessity were unlawful and inhumane. *See* Y.F. v. Turkey, No. 24209/94, 2003-IX Eur. Ct. H.R. para. 43, *available at* http://cmiskp.echr.coe.int/. In this case, a young woman was forced to submit to a gynecological exam upon detention to prove that she was not sexually assaulted by her guards. *Id* at para. 12. The court, citing the country's constitution, accordingly held that the physical interference with a person's body is only permitted in the case of medical necessity or if allowed by law. *Id.* at para. 23. The court reasoned that a person's body concerns the most intimate aspect of the person's private life, and thus medical intervention, even if of minor importance, constitutes an interference with the right to privacy. *Id.* at para. 33.

For similar reasons – and recognizing the unique dangers to children when their privacy is breached by a strip search – the British government passed protective legislation to decrease the use of strip searches on incarcerated juveniles. *See* Tim Newburn et al., *Race, Crime and Injustice: Strip Search and the Treatment of Suspects in Custody*, 44 Brit. J. Criminology 677, 683-84 (2004). As a result, youth in Britain are strip searched at significantly lower rates than adults. *Id.*

The reluctance throughout the international community to allow strip searches of children, even in secure facilities, underscores the extent to which Savana's strip search – on school grounds with no criminal justice involvement – was out-of-line with international norms.

B. The Severe Intrusion and Potential Trauma of a Strip Search Outweigh the Benefit in Discovering Ibuprofen in a Student's Possession.

As a preliminary matter, *Amici* agree with Respondents that the information that Savana had ibuprofen was not reliable, and that the school was especially remiss in conducting a strip search with no reason to believe that the ibuprofen was hidden in Savana's undergarments. We write separately to underscore the high bar that must be met to conduct a strip search.

This Court has held that in determining the nature of the governmental concern, courts should assess the "efficacy of [the] means for addressing the problem." *Vernonia*, 515 U.S. at 663. Thus, a search that is not well-designed to effectuate its purpose weighs against a finding of constitutionality. *See Chandler*, 520 U.S. at 319. Although securing order in the school environment sometimes requires exercising greater control over students than what is appropriate for adults, *see Earls*, 536 U.S. at 839, the interests of students must not be invaded any more than necessary to achieve the legitimate end of preserving order in the school. *T.L.O.*, 469 U.S. at 343.

The extreme harm and intrusion of a strip search of an adolescent outweighs the potential benefit of discovering ibuprofen on a student.

Indeed, because of the very intrusive nature of a strip search, many states expressly prohibit the use of strip searches in schools in all circumstances. *See, e.g.*, Cal. Educ. Code §49050; Iowa Code § 808A.2(4)(a); Okla. Stat. tit.70, §24-102; N.J. Stat. Ann. § 18A:37-6.1; S.C. Code Ann. §59-63-1140; Wash. Rev. Code § 28A.600.230(3); Wis. Stat. §948.50(3). Many of these statutes explicitly address – and prohibit – searches like Savana's in which undergarments are moved for the purpose of a visual inspection. *See, e.g.*, Cal. Educ. Code §49050 (prohibiting body cavity searches and prohibiting school officials from "[r]emoving or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil"); Okla. Stat. tit.70, §24-102 ("In no event shall a strip search of a student be allowed. No student's clothing, except cold weather outerwear, shall be removed prior to or during the conduct of any warrantless search"); Wis. Stat. §948.50(2)(b). ("'Strip search' means a search in which a persons genitals, pubic area, buttock or anus, or a female persons breast, is uncovered and either is exposed to view or is touched by a person conducting the search").

In New Jersey, the legislature explicitly recognized that under their bill, strip searches would not be permitted even when "the school personnel had reasonable grounds to believe that the pupil had committed a criminal offense." *Assembly Judiciary*

Committee Statement on Bill No. 1167, 1997 N.J. Assem. c.242 (N.J. 1997).

Wisconsin highlights the importance of protecting children from strip searches by (1) establishing that a school strip search is a Class B misdemeanor; and (2) clarifying that "[t]he legislature intends, by enacting this section, to *protect* pupils from being strip searched." Wis. Stat. §948.50(3) (emphasis added).

Although Arizona does not prohibit strip searches by statute, as many as 189 school districts in Arizona prohibit them as a matter of policy.[5] In

---

[5] In the following Arizona school districts, disrobing of a student is overly intrusive for purposes of most student searches and is improper without express concurrence from school district counsel: Agua Fria, Ajo, Alhambra, Alpine, Altar Valley, Antelope, Apache, Arlington, Ash Creek, Ash Fork, Avondale, Bagdad, Balsz, Beaver Creek, Benson, Bicentennial, Bisbee, Blue Ridge, Bonita, Bouse, Bowie, Buckeye Elementary, Buckeye Union, Bullhead City, Camp Verde, Canon, Cartwright, Casa Grande Elementary, Casa Grande High School, Cave Creek, Coconino Association for Vocations, Cedar, Chandler, Chino Valley, Clarkdale-Jerome, Clifton, Cochise, Colorado City, Colorado River, Concho, Congress, Coolidge, Cottonwood, Creighton, Double Adobe, Deer Valley, Douglas, Duncan, Dysart, Eloy, Flagstaff, Florence, Flowing Wells, Fowler, Fredonia-Moccasin, Ft. Huachuca, Fountain Hills, Ft. Thomas, Gadsden, Ganado, Gila Institute for Technology, Gila Bend, Gila County Regional, Glendale Elementary, Graham County, Grand Canyon, Hackberry, Hayden-Winkleman, Heber-Overgaard, Higley, Holbrook, Humboldt, Hyder, Isaac, J.O. Combs, Kayenta, Kestrel High, Kingman Academy of Learning, Kingman, Kirkland, Kyrene, Lake Havasu Unified, Laveen, Liberty, Litchfield, Littlefield, Littleton, Madison, Maine Consolidated, Mammoth-San Manuel, Mayer, McNary, McNeal, Mingus, Mobile, Mohave Valley, Mohawk Valley, Morenci, Morristown, Murphy, Naco, Nadaburg, Northern Arizona Vocational, Nogales, Oracle, Osborn, Page, Paloma,

fact, even the Safford School District's policy now prohibits this type of strip search.[6]

Palominas, Palo Verde, Parker, Patagonia, Pathways Charter, Payson, Pearce, Pendergast, Phoenix Elementary, Phoenix Union (5/11/06); Pima Unified, Pinal Accommodation, Pine Strawberry, Pinnacle Education, Pinon, Prescott, Quartzite, Queen Creek, Rainbow Accommodation, Ray, Riverside, Vicki A. Romero High, Roosevelt, Round Valley, Sacaton, Santa Cruz Elementary, Saddle Mountain, Safford, Sahuarita, Salome, San Carlos, Santa Cruz, Sanders, San Fernando, San Simon,Santa Cruz Valley UHS, Santa Cruz Valley USD, Sedona-Oak Creek, Seligman, Sentinel, Show Low, Skull Valley, Snowflake, Solomon, Somerton, Sonoita, Stanfield, St. David, St. Johns, Sunnyside, Superior, Tanque Verde, Tempe Elementary, Thatcher, Tolleson Union High, Tolleson Elementary, Toltec, Tombstone, Union, Vail, Venerable, Vernon, Washington Elementary, Wellton, Wenden Elementary, Whiteriver, Wickenburg Unified, Willcox, Williams, Wilson, Window Rock, Winslow, Yarnell, Young, and Yuma Union High. *See* Arizona School Boards Association, School District Policy Manuals, *available at* http://lp.ctspublish.com/asba/ (follow "Publicly Available Policy Manuals" hyperlink; then scroll in sidebar to "[Name of School District] Policy Manual" hyperlink; then follow "Section J Students" hyperlink; then follow "J-3400 JIH Student Interrogation, Searches, and Arrests"). In the Amphitheater School District, removal of a student's clothing is prohibited in the absence of an emergency justifying the search, as determined after consultation with law enforcement officials or the Superintendent. *See* the Amphitheater School District's policy manual at http://lp.ctspublish.com/asba/. In the Mesa Unified, Marana, Scottsdale and Sierra Vista school districts school personnel are prohibited from conducting strip searches. *See* Mesa Public Schools, Selected Policy and Procedure Manuals, *available at* http://www.mpsaz.org/policies/MPSpolicy.pdf; Marana, Scottsdale, and Sierra Vista school districts' policy manuals at http://lp.ctspublish.com/asba/.

[6] Safford Policy Manual, http://lp.ctspublish.com/asba/ ("Disrobing of a student is overly intrusive for purposes of most

Given the importance – recognized by many jurisdictions – in avoiding the harm of a strip search regardless of the reason, and the overwhelming harm of a strip search, the current search was not justified. The harm of the strip search both to Savana and to her peers, who may have feared similar treatment, far outweighs the potential benefit of locating ibuprofen.

CONCLUSION

For the foregoing reasons, *Amici Curiae*, Juvenile Law Center, et al., respectfully request that this Court affirm the *en banc* decision of the court of appeals.

Respectfully Submitted,

Marsha L. Levick, Esq.
Jessica R. Feierman, Esq.
Riya S. Shah, Esq.
Sherry E. Orbach, Esq.
Emily C. Keller, Esq.
JUVENILE LAW CENTER
1315 Walnut Street, Suite 400
Philadelphia, PA 19107

Counsel for *Amici Curiae*

Dated: April 1, 2009

---

student searches and is improper without express concurrence from School District counsel.").

APPENDIX A

IDENTITY OF AMICI CURIAE AND STATEMENTS OF INTEREST

Organizations

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Barton Child Law and Policy Clinic** at Emory University School of Law (Barton) was founded in March 2000. Barton was originally established to address the need in Georgia for an

organization dedicated to effecting systemic policy and process changes for the benefit of the children in Georgia's child welfare system. In 2006, Barton was expanded to include a direct representation clinic known as the Juvenile Defender Clinic (JDC) for those children charged with delinquent and unruly offenses. With the addition of the JDC, Barton's current mission is to promote and protect the well-being of neglected, abused and court-involved children in the state of Georgia, to inspire excellence among the adults responsible for protecting and nurturing these children, and to prepare child advocacy professionals.

The JDC provides a clinical experience for third year law students in the juvenile court arena. The focus of the clinical experience is to provide quality representation to children by ensuring fairness and due process in their court proceedings and by ensuring courts make decisions informed by the child's educational, mental health and family systems objectives. As part of their clinical experience, student attorneys represent child clients in juvenile court and provide legal advocacy in the areas of school discipline, special education, mental health and public benefits, when such advocacy is derivative of a client's juvenile court case. Students also engage in research and participate in the development of public policy related to juvenile justice issues.

The JDC at Barton is a clinic supported in its entirety by the Emory University School of Law. Legal services are provided at no cost to its clients.

The **Children & Youth Law Clinic** (CYLC) is an in-house legal clinic, staffed by faculty and students at the University of Miami School of Law, which advocates for the rights of children in abuse and neglect, delinquency and other legal proceedings. Founded in 1995, the CYLC has appeared as amicus curiae in numerous federal and state court cases implicating significant due process and therapeutic interests of children in state custody. The CYLC has pioneered the use of "therapeutic jurisprudence" in its advocacy for children in school discipline, dependency, mental health, delinquency, and other court proceedings. Therapeutic jurisprudence is a field of social inquiry with a law reform agenda, which studies the ways in which legal rules, procedures, and the roles of legal actors produce therapeutic or anti-therapeutic consequences for those affected by the legal process. The CYLC works to ensure that children are treated with dignity and respect by public education, child welfare and juvenile justice systems charged with their schooling, protection and treatment. We believe that public policy should further the therapeutic interests of children, minimize anti-therapeutic consequences of the legal process, assure their fair and dignified treatment, and promote the rehabilitative purposes of the juvenile justice system.

The ***Civitas* ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through

interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children. The ChildLaw Center maintains a particular interest in the rules and procedures regulating the legal and governmental institutions responsible for addressing the needs and interests of court-involved youth.

Education Law Center–PA (ELC-PA) is a private, non-profit public interest law firm and advocacy organization dedicated to helping Pennsylvania's most "at-risk" children obtain a quality education. ELC-PA focuses on the needs of children who are poor, of color, have disabilities, are in the child welfare or juvenile justice system, or who are otherwise educationally disadvantaged. For more than thirty years, ELC-PA has worked to improve the quality of public education for Pennsylvania students through the provision of advice,
training, publications, technical assistance to attorneys and advocates, and co-counseling and representation of families in the courts and before administrative and legislative bodies. ELC-PA has participated as *amicus curiae* in state and federal courts as well as this Court.

The **Justice for Children Project** is an educational and interdisciplinary research project housed within The Ohio State University Michael

E. Moritz College of Law. Begun in January 1998, the Project's mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Practicum and through its amicus work, the Justice for Children Project strives to advance the cause of children's rights in delinquency, status offense, abuse, neglect, and other legal proceedings affecting children's interests.

The **Juvenile Rights Advocacy Project** (JRAP) is curricular law clinic, based at Boston College Law School since 1995. JRAP represents youth, with a focus on girls, who are in the delinquency or status offense systems, across systems and until the youth reach majority. JRAP attorneys use legal system to access social services and community supports for youth, hold systems accountable, and reduce the use of incarceration. JRAP also conducts research and policy advocacy for youth in the justice system. Among its work, JRAP seeks to develop and model programs for delinquent girls that reduce the use of incarceration and detention, and prompt systems to work collaboratively to shore up community

resources supporting youth.

The **Mid-Atlantic Juvenile Defender Center** (MAJDC) is one of nine regional centers created by the National Juvenile Defender Center in 1999. MAJDC is a multi-faceted juvenile defense resource center serving the District of Columbia, Maryland, Puerto Rico, Virginia and West Virginia. We are committed to working within communities to ensure excellence in juvenile defense and promote justice for all children. MAJDC promotes policy development in the region through conducting state based assessments of access to counsel and quality of representation in delinquency proceedings. MAJDC also coordinates training programs for defenders, provides technical assistance and encourages the development of oversight and accountability in the justice system.

The **National Center for Youth Law** (NCYL) is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, *Youth Law News*, and by providing trainings and technical

assistance. NCYL has participated in litigation that has improved the quality of foster care in numerous states, expanded access to children's health and mental health care, and reduced reliance on the juvenile justice system to address the needs of youth in trouble with the law. NCYL also works to protect the rights of children in juvenile and adult criminal justice systems, at all stages of the proceedings, and to ensure that they are treated fairly consistent with their age and stage of development.

The **National Juvenile Defender Center** (NJDC) was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a better capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. It also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The **Northeast Juvenile Defender Center** (NJDC) is committed to ensuring excellence in juvenile defense and promoting justice for all children caught up within the juvenile justice system. A regional affiliate of the National Juvenile Defender Center, the NJDC strives to increase and support effective advocacy for young people in New Jersey, Delaware, New York, and Pennsylvania. Focus areas of the NJDC include juvenile detention conditions and over-utilization; dispositional advocacy; over-representation of minority children in the juvenile justice system; and training, advocacy, and technical assistance for juvenile defenders and defender agencies.

Housed jointly within the two Rutgers Law Schools and the Defender Association of Philadelphia, the NJDC works to evaluate and improve the juvenile defense and juvenile justice systems and to assist professionals working within those systems. To date, the NJDC has collaborated with the Juvenile Law Center, the American Bar Association, and the National Juvenile Defender Center on an assessment of juvenile defense services in Pennsylvania; created a regional listserve; presented training programs in New York, New Jersey, and Pennsylvania; worked with the New Jersey Office of the Public Defender to enhance access to effective assistance of counsel for children charged with delinquency; and offered advocacy support to attorneys across the region.

In light of its central commitment to ensuring due process for young people, the NJDC has significant expertise in the issues raised by this litigation and substantial interest in its outcome.

The **Rutgers Urban Legal Clinic**, a clinical program of Rutgers Law School – Newark, was established over thirty years ago to assist low-income clients with legal problems that are caused or exacerbated by urban poverty. The Clinic's Criminal and Juvenile Justice section provides legal representation to individual clients and undertakes public policy research and community education projects in both the juvenile and criminal justice arenas. In recent years, ULC students and faculty have worked with the New Jersey Office of the Public Defender, the New Jersey Institute for Social Justice, the Essex County Juvenile Detention Center, Covenant House – New Jersey, staff of the New Jersey State Legislature, and a host of national organizations on a range of juvenile justice practice and policy issues, including questions pertaining to the due process and fourth amendment rights of young people.

The **Women's Law Project** (WLP) is a non-profit legal advocacy organization in Pennsylvania. Founded in 1974, the WLP works to advance the legal and economic status of women through litigation, public policy development, education and one-on-one counseling. The WLP is committed to protecting the health and well-being of young women. Throughout its existence, the WLP has played a leading role in the struggle to protect women's privacy, safety, and treatment under the law in the context of health care decisions and law enforcement's response to sexual assault and domestic violence. The WLP served as co-counsel

for plaintiffs in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). The Women's Law Project has also worked on a variety of projects to improve the conditions of women prisoners across the state of Pennsylvania, starting with litigation on behalf of women prisoners in the State Correctional Institution at Muncy that drastically altered the way women were incarcerated in Pennsylvania (*Beehler v. Jeffes*, 664 F. Supp. 931 M.D. Pa. 1986) and continuing to the present day.

Youth Law Center is a San Francisco-based national public interest law firm working to protect the rights of at-risk children, especially those in out-of-home confinement through the juvenile justice or child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases in California and two dozen other states. The Center has also provided research, training, and technical assistance on juvenile law and policy issues for juvenile facilities to public officials in almost every State. Youth Law Center attorneys have written widely on a range of juvenile justice, child welfare, health and education issues. The Center's attorneys have participated as amicus curiae in California and around the country in juvenile cases involving questions of constitutional law.

One of the Center's ongoing interests has been the treatment of children in educational

settings. Moreover, the Center has had a long-term commitment to protecting children against practices that are humiliating or demeaning, and unnecessarily intrusive. This case, involving the strip search of a 13 year-old girl at school, fits squarely within those interests.

Individuals

Professor Barry Feld is Centennial Professor of Law, University of Minnesota Law School. He received his B.A. from the University of Pennsylvania; his J.D. from University of Minnesota Law School; and his Ph.D. in sociology from Harvard University. He has written eight books and about seventy law review and criminology articles and book chapters on juvenile justice with a special emphasis on serious young offenders, procedural justice in juvenile court, adolescents' competence to exercise and waive *Miranda* rights and counsel, youth sentencing policy, and race. Feld has testified before state legislatures and the U. S. Senate, spoken on various aspects of juvenile justice administration to legal, judicial, and academic audiences in the United States and internationally. He worked as a prosecutor in the Hennepin County (Minneapolis) Attorney's Office and served on the Minnesota Juvenile Justice Task Force (1992 - 1994), whose recommendations the 1994 legislature enacted in its revisions of the Minnesota juvenile code. Between 1994 and 1997, Feld served as Co-Reporter of the Minnesota Supreme Court's

Juvenile Court Rules of Procedure Advisory Committee.

Professor Kristin Henning is a Professor of Law and the Co-Director of the Juvenile Justice Clinic at Georgetown Law Center. Professor Henning joined the faculty in 1995 as a Stuart-Stiller Fellow in the Criminal and Juvenile Justice Clinics. As a Fellow she represented adults and children in the D.C. Superior Court, while supervising law students in the Juvenile Justice Clinic. In 1997, Professor Henning joined the staff of the Public Defender Service for the District of Columbia where she continued to represent clients and helped to organize a Juvenile Unit designed to meet the multi-disciplinary needs of children in the juvenile justice system. She served as Lead Attorney for the Juvenile Unit from 1998 until she left the Public Defender Service to return to Georgetown in 2001. Professor Henning has been active in local, regional and national juvenile justice reform, serving on the Board of the Mid-Atlantic Juvenile Defender Center, the D.C. Department of Youth Rehabilitation Services Advisory Board and Oversight Committee, and on local D.C. Superior Court committees such as the Delinquency Working Group and the Family Court Training Committee. She has published a number of law review articles on the role of child's counsel, the role of parents in delinquency cases, confidentiality in juvenile courts, victims' rights, and therapeutic jurisprudence in the juvenile justice system. She is also a lead contributor to the *Juvenile Law and Practice* chapter of the District of

Columbia Bar Practice Manual. Professor Henning traveled to Liberia in 2006 and 2007 to aid the country in juvenile justice reform and was awarded the 2008 Shanara Gilbert Award by the Clinical Section of the Association of American Law Schools in May for her commitment to social justice on behalf of children. Professor Henning is currently a Visiting Professor of Law at NYU Law School during the Spring semester of 2009.

Professor Wallace Mlyniec is the former Associate Dean of Clinical Education and Public Service Programs, and currently the Lupo-Ricci Professor of Clinical Legal Studies, and Director of the Juvenile Justice Clinic at Georgetown University Law Center. He teaches courses in family law and children's rights and assists with the training of criminal defense and juvenile defense fellows in the Prettyman Legal Internship Program. He is the author of numerous books and articles concerning criminal law and the law relating to children and families. Wallace Mlyniec received a Bicentennial Fellowship from the Swedish government of study their child welfare system, the Stuart Stiller Award for public service, and the William Pincus award for contributions to clinical education. He holds his B.S. from Northwestern University and his J.D. from Georgetown University. He is the Vice Chair of the Board of Directors of the National Juvenile Defender Center and former chair of the American Bar Association Juvenile Justice Committee.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
APR 1 - 2009
OFFICE OF THE CLERK

No. 08-479

IN THE
Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, ET AL.,
Petitioners,

v.

APRIL REDDING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND ITS ARIZONA CHAPTER, THE NATIONAL EDUCATION ASSOCIATION, THE NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS, THE AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, AND THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN IN SUPPORT OF RESPONDENT APRIL REDDING

Carolyn I. Polowy
Sherri Morgan
NATIONAL ASSOCIATION OF SOCIAL WORKERS
750 First St., NE, Suite 700
Washington, DC 20002
(202) 408-8600

Julia M. Carpenter*
Michael A. Hoffman
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
*Counsel of Record

Michael D. Simpson
NATIONAL EDUCATION ASSOCIATION
1201 Sixteenth St., NW
Washington, DC 20036
(202) 822-7035

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 5
I. A Strip Search Of A 13-Year-Old Student By School Authorities Is An Extraordinarily Intrusive Search 5
A. Social Science Research Warns That Strip Searches Can Cause Severe Emotional And Psychological Harm To Children. 6
B. States, School Boards, And Courts Have Agreed With Social Science Researchers That School Strip Searches Are Excessively Intrusive And Traumatic. 14
II. An Excessively Intrusive Search, Such As A Strip Search, Could Only Be Justified By A Heightened Quantum Of Suspicion. 18
A. The Reasonable Suspicion Determination Must Balance Risk To Health/Safety, Locational Specificity, Weight Of Available Evidence, And Possible Alternatives To The Search. 18
B. The Decision To Strip Search Savana Was Wholly Unjustified Under *T.L.O.* 26
CONCLUSION 33

TABLE OF AUTHORITIES

CASES

Bravo ex rel. Ramirez v. Hsu, 404 F. Supp. 2d 1195 (C.D. Cal. 2005) 31

Chapman v. Nichols, 989 F.2d 393 (10th Cir. 1993) 16

Cornfield ex rel. Lewis v. Consolidated High School District No. 230, 991 F.2d 1316 (7th Cir. 1993) ..... *passim*

Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980) 17

Eddings v. Oklahoma, 455 U.S. 104 (1982) 18

Fewless ex rel. Fewless v. Board of Education, 208 F. Supp. 2d 806 (W.D. Mich. 2002) 23, 24

Flores v. Meese, 681 F. Supp. 665 (C.D. Cal. 1988), *aff'd*, 942 F.2d 1352 (9th Cir. 1991), *rev'd on other grounds sub nom. Reno v. Flores*, 507 U.S. 292 (1993) 7

Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982) 16

In re K.C.B., 141 S.W.3d 303 (Tex. Ct. App. 2004) 21, 24

Jenkins by Hall v. Talladega City Board of Education, 115 F.3d 821 (11th Cir. 1997) .. 20, 23

Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992) 16

Morse v. Frederick, 551 U.S. 393, 127 S. Ct. 2618 (2007) 32

New Jersey v. T.L.O., 469 U.S. 325 (1985) .. *passim*

People v. D., 315 N.E.2d 466 (N.Y. 1974)..... 17

Phaneuf v. Fraikin, 448 F.3d 591 (2d Cir. 2006)..... 19, 22, 23, 24, 29, 30

Plyler v. Doe, 457 U.S. 202 (1982)..... 25

R. v. Golden, [2001] 3 S.C.R. 679 (Can.) 16

Sostarecz v. Misko, No. Civ. A. 97-cv-2112, 1999 WL 239401 (E.D. Pa. Mar. 26, 1999)..... 31

Thomas ex rel. Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *vacated for reconsideration*, 536 U.S. 953 (2002), *reinstated* 323 F.3d 950 (11th Cir. 2003)... 20, 26

Williams ex rel. Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991)..... 27

STATUTES

Cal. Educ. Code § 49050 15

Iowa Code § 808A.2(4)(a) 15

Iowa Code § 808A.2(4)(b) 15

N.J. Stat. Ann. § 18A:37-6.1 15

Okla. Stat. Title 70, § 24-102..... 15

S.C. Code Ann. § 59-63-1140 15

Wash. Rev. Code § 28A.600.230(3) 15

Wis. Stat. § 948.50(3)..... 14

OTHER AUTHORITIES

Am. Acad. of Child & Adolescent Psychiatry, *Facts for Families: Posttraumatic Stress Disorder (PTSD)*, No. 70, (updated Oct. 1999), http://www.aacap.org/cs/root/facts_for_families/posttraumatic_stress_disorder_ptsd (last visited Mar. 30, 2009) 8-9

Am. Prof. Soc. on the Abuse of Child., Practice Guidelines: Psychosocial Evaluation of Suspected Psychological Maltreatment in Children and Adolescents (1995) 8

Central Intelligence Agency, *Kubark Counterintelligence Interrogation* (1963), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/#kubark 16

Kristin D. Eisenbraun, *Violence in Schools: Prevalence, prediction, and prevention*, 12 Aggression & Violent Behav. 459 (2007) 7, 11

Laura L. Finley, *Examining School Searches as Systemic Violence*, 14 Critical Criminology 117 (2006) 7, 10, 11

Helen Freake *et al.*, *Adolescents' views of helping professionals: A review of the literature*, 30 J. ADOLESCENCE 639 (2007) 12

The Harriet Lane Handbook. A Manual for Pediatric House Officers (Jason Robertson & Nicole Shilkofski eds., The Johns Hopkins Hospital, 17th ed. 2005) 27

Dennis Hevesi, *Jury Awards $125,000 to Student Strip-Searched at a Bronx School*, N.Y. TIMES, Nov. 24, 1988 10

Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7 (1998) 7, 9, 11, 12

Gary B. Melton & Janet Corson, *Psychological Matreatment and the Schools: Problems of Law and Professional Responsibility* 25

Mesa Unified School Dist. Governing Bd. Policy and Admin. Regs., Code JFG (rev. 1999), at http://www.mpsaz.org/policies/MPSpolicy.pdf (last visited Mar. 30, 2009) 15

Nat'l Ass'n of Sch. Psychol., *Position Statement: Children's Rights* (2003), at http://www.nasponline.org/about_nasp/positionpapers/ChildrensRights.pdf 25-26

Nat'l Ass'n of Sch. Psychol., *Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers* (2008), at http://www.nasponline.org/educators/zero_alternative.pdf 14

National Child Traumatic Stress Network - Understanding Child Traumatic Stress, http://www.nctsn.org/nccts/nav.do?pid=ctr_aud_prnt_under (last visited Mar. 30, 2009) 8

New York City Dep't of Education, Regulation A-432 (2005), at http://docs.nycenet.edu/docushare/dsweb/Get/Document-21/A-432.pdf (last visited Mar. 30, 2009) 15

Pitt County Board of Education, Policy 10.201 (2008), at http://www.pitt.k12.nc.us/boe/files/10/10.201-P_Search_and_Seizure_Procedures.doc (last visited Mar. 30, 2009) 15

F. Philip Rice & Kim Gale Dolgin, THE ADOLESCENT: DEVELOPMENT, RELATIONSHIPS, AND CULTURE (11th ed. 2005) 7

School Board of the City of Virginia Beach Regulation 5-65.1 (2001), at http://www.vbschools.com/policies/5-65_1r.asp (last visited Mar. 30, 2009) 15-16

Scottsdale Unified School Dist. No. 48 Policy Manual, J-3400 JIH (2003), at http://lp.ctspublish.com/asba/public/lpext.dll/Scottsdl/1890/1cd1?fn=document-frame.htm&f=templates&2.0 (last visited Mar. 30, 2009) 15

Social Work Speaks, National Association of Social Workers Policy Statements, 2009-2012 (8th ed. 2009) 5, 6, 14

Steven F. Shatz *et al.*, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1 (1991) 8

Verdict Summary, *McCloud v. Fortune*, 510 F. Supp. 2d 649 (N.D. Fla. 2007), 2006 WL 1195092 10

Jesse Ann White, *A Study of Strip Searching in Pennsylvania Public Schools and an Analysis of the Knowledge, Attitudes, and Beliefs of Pennsylvania Public School Administrators Regarding Strip Searching* (Aug. 2000) (unpublished Ph.D. dissertation, Temple University) (on file with the Temple University Graduate Board) 10-11

INTEREST OF *AMICI CURIAE*

With 145,000 members, the National Association of Social Workers ("NASW") is the largest organization of professional social workers in the world, with fifty-six chapters in the United States and internationally.[1] The Arizona Chapter of NASW represents 1,936 members. NASW's members are highly trained and experienced professionals who counsel individuals, families, and communities in a variety of settings, including schools, making them directly interested as providers of mental health services to schoolchildren who experience trauma.

The National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA has long supported the constitutional rights of students, filing amicus briefs with this Court in *Goss v. Lopez* (due process), *Ingraham v. Wright* (corporal punishment), *Bethel School District v. Fraser* (free speech), and *New Jersey v. T.L.O.* (warrantless searches). NEA has, in addition, adopted various resolutions opposing unreasonable searches of students by school officials.

The National Association of School Psychologists ("NASP") represents over 25,000 school psychologists and related professionals throughout the United

---

[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part. The DKT Liberty Project contributed money to support the preparation and submission of this brief although the *amici* were not compensated in any way.

States and 25 foreign countries. Founded in 1969, it is the world's largest organization of school psychologists. NASP members work in educational settings from preschool through the university level.

The American Society for Adolescent Psychiatry ("ASAP") is the only organization specializing in adolescents and their families in the area of mental health issues. ASAP represents the needs of adolescents and of adolescent psychiatrists both within psychiatry and in the larger community.

The American Professional Society on the Abuse of Children ("APSAC") is a multidisciplinary society of professionals working in the fields of child abuse research, prevention, treatment, investigation, litigation, and policy. Founded in 1987, APSAC has more than 2,500 members, including professionals from all fifty states. APSAC seeks to increase knowledge about abuse and to promote effective identification, intervention, and treatment of abused children, their families, and offending individuals.

Amici submit this brief to explain and document the intrusive nature and traumatic effects of school strip searches on adolescents and school communities.

SUMMARY OF ARGUMENT

In *New Jersey v. T.L.O.*, this Court mandated that schoolhouse searches be "reasonably related to the objectives of the search and not excessively intrusive." 469 U.S. 325, 342 (1985). And Justice Stevens gave heft to what "excessively intrusive" meant when he observed, "One thing is clear under any standard—the shocking strip searches that are

described in some cases have no place in the schoolhouse." *Id.* at 382 n.25 (Stevens, J., concurring in part & dissenting in part). Yet, some school officials have used the extraordinarily intrusive technique of strip searches on children and adolescents. *Amici* represent groups who work daily on behalf of children and are uniquely aware of the psychological and emotional harm to which children can be exposed. Social science research demonstrates that strip searches can traumatize children and adolescents and result in serious emotional damage. The effects, both acute and long-term, can be akin to those of psychological maltreatment. Likewise, states, school boards, and courts nationwide have recognized that strip-searching children is severely intrusive.

Because they are excessively intrusive, schoolhouse strip searches are only permissible, if ever, in a very narrow range of cases. Pursuant to *T.L.O.*'s mandate, such searches require a heightened quantum of suspicion, which is informed by four factors. First, *T.L.O.*'s mandate to consider a search's intrusiveness in light of the "nature of the infraction" requires limiting strip searches to instances in which the item searched for poses an immediate and serious risk to health or safety. Second, such highly invasive searches must be justified by specific evidence indicating that the contraband will be detected by means of the contemplated search. Third, a heightened weight of evidence, considering both its nature and reliability, must support the first two factors. Fourth, an intrusive strip search is not justified where there are

alternatives that would neutralize the immediate danger.

Under this analysis, the strip search of Savana Redding was wholly lacking in the reasonable suspicion mandated by *T.L.O.* First, the potential possession of menstrual cramp medication posed no immediate threat to health or safety. Second, there was no evidence that pills were located on Savana in a place that necessitated a strip search. Third, considering the weight of evidence, the only source of information was an uncorroborated tip from another student already in trouble for possessing the same medication. Fourth, less intrusive alternatives, including questioning others, searching other locations, and calling Savana's parents before resorting to a strip search, were ignored.

What is clear is that a thirteen year-old honors student with no disciplinary problems was forced to undergo a strip search that left her exposed, subjecting her to immediate humiliation, embarrassment, and to potentially long-term emotional and social trauma, because of her alleged possession of Ibuprofen and based solely on the statement of another student. If the Constitution and this Court's decision in *T.L.O.* do not prevent such excessively intrusive searches, then America's schoolchildren have been effectively carved out from the constitutional protections they are told in class apply to all.

ARGUMENT

I. A Strip Search Of A 13-Year-Old Student By School Authorities Is An Extraordinarily Intrusive Search.

In *New Jersey v. T.L.O.*, this Court established the test for determining whether the search of a student violates the Fourth Amendment. 469 U.S. 325 (1985). "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-42 (footnote omitted). Critically, the search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and *not excessively intrusive in light of the age and sex of the student and the nature of the infraction.*" *Id.* at 342 (emphasis added).

Underpinning this ruling is the fact that children are not just short adults. As NASW has stated, "NASW supports the fact that children and youth are developmentally different from adults and must be treated appropriately." *Social Work Speaks, National Association of Social Workers Policy Statements, 2009-2012* 210 (8th ed. 2009). Here, those developmental differences require not only a different framework to analyze the reasonableness of Fourth Amendment searches, but also a clear understanding of the effects of excessively intrusive

searches on children and youth. On that subject, *amici* can speak with some authority.

A. Social Science Research Warns That Strip Searches Can Cause Severe Emotional And Psychological Harm To Children.

Amici recognize the importance of treating children in ways that recognize their developmental differences, including in the disciplinary context. As NASW has noted, "It did not take long for early [juvenile justice] reformers to realize [that] it was neither humane nor effective to treat children and youths in the same manner as adults." *Social Work Speaks, supra*, at 208. Treating children the same as adult suspects and offenders, including using law enforcement techniques designed for adults, is neither useful as a practical matter nor acceptable as a constitutional matter.

Recognizing this reality, schools generally do not treat children as adults, but appreciate the developmental phases of youth and adolescence. So, it is a matter of concern that some schools have resorted to applying the most intrusive adult detection procedures, such as strip searches, to children. The failure to appreciate the emotional and psychological impact of these searches, both on the child and the peer group, has led some school officials to underestimate the immediate and long-term consequences of strip searches.

Even for adults, a strip search is a demeaning and distasteful procedure that requires a high level of justification. For children and adolescents, it is far more significant. "With the onset of puberty,

most young people begin to make a thorough assessment of themselves," including comparing their bodies. F. Philip Rice & Kim Gale Dolgin, THE ADOLESCENT: DEVELOPMENT, RELATIONSHIPS, AND CULTURE at 168 (11th ed. 2005). "This critical self-appraisal is accompanied by self-conscious behavior that makes adolescents vulnerable to embarrassment." *Id.*

Therefore, for adolescent youth, "[c]linical evaluations of the [youth] victims of strip searches indicate that they can result in serious emotional damage, including the development of, or increase in, oppositional behavior." Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998). Indeed, students who have undergone strip searches "often cannot concentrate in school, and, in many cases, transfer or even drop out." Laura L. Finley, *Examining School Searches as Systemic Violence*, 14 Critical Criminology 117, 126 (2006); *see also Flores v. Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988) ("Children are especially susceptible to possible traumas from strip searches."), *aff'd*, 942 F.2d 1352 (9th Cir. 1991), *rev'd on other grounds sub nom. Reno v. Flores*, 507 U.S. 292 (1993); Kristin D. Eisenbraun, *Violence in Schools: Prevalence, prediction, and prevention*, 12 Aggression & Violent Behav. 459, 465 (2007) ("Strip searches have been shown to have a negative impact on student self-esteem."). And "[p]sychological experts have also testified that victims often suffered post-search symptoms including 'sleep disturbance, recurrent

and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions,' and that some victims have been moved to attempt suicide." Steven F. Shatz *et al.*, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 12 (1991).

Strip searches, therefore, can have effects akin to those of psychological maltreatment. Psychological maltreatment produces both acute and long-term negative effects that may include "attachment disorders, limitations in cognitive ability and problem solving, poor academic achievement, poor peer relationships, behavior problems, anxiety disorders (especially PTSD), and anti-social behavior." *Am. Prof. Soc. on the Abuse of Child.*, *Practice Guidelines: Psychosocial Evaluation of Suspected Psychological Maltreatment in Children and Adolescents*, at 3 (1995).

Indeed it is worth noting that the trauma of a strip search actually could *encourage* some of the precise inappropriate behavior that strip searches are supposed to detect and prevent. *See National Child Traumatic Stress Network - Understanding Child Traumatic Stress*, http://www.nctsn.org/nccts/nav.do?pid=ctr_aud_prnt_under (last visited Mar. 30, 2009) ("Adolescents can try to get rid of post-trauma emotions and physical responses through the use of alcohol and drugs."). Trauma may also lead to feelings of revenge that "interfere with [students'] efforts to manage aggressive feelings in a more constructive, rule abiding way." *Id.* Given such potential effects, "The best approach is prevention of the trauma." Am. Acad. of Child &

Adolescent Psychiatry, *Facts for Families: Posttraumatic Stress Disorder (PTSD)*, No. 70, (updated Oct. 1999), http://www.aacap.org/cs/root/facts_for_families/posttraumatic_stress_disorder_ptsd (last visited Mar. 30, 2009).

Nor is this research just theoretical. In a well-known case in Pennsylvania, school officials conducted strip searches of seven adolescents based on a student tip that one of them was distributing marijuana. All seven were evaluated by a psychologist. All seven had developed some stress symptoms from the search, and two of the seven were diagnosed with full-blown Post Traumatic Stress Disorder. The author of the study summarized:

> The more severe stress responses included refusal to go back to school, ruminations about revenge, undesired thoughts about the incident, loss of faith in school staff whom they once trusted, increased tendency toward either avoidance and withdrawal or aggression and increased anger and defiance at home. These symptoms lasted long enough in the older students to result in attempts to withdraw from school and alleged delinquent behavior.

Hyman & Perone, *supra*, at 14.

These findings are reinforced by individual accounts of student victims of strip searches. For example, a 15-year-old girl with no disciplinary history was strip searched by New York school

officials for suspicion of possessing marijuana. A psychiatrist who treated the girl during fourteen visits following the strip search stated, "Quite consistently, she showed symptoms of intense anxiety, loss of concentration, loss of sleep. She gave up her plans to go to an out-of-town college and, in fact, had to repeat a semester in school." Dennis Hevesi, *Jury Awards $125,000 to Student Strip-Searched at a Bronx School*, N.Y. TIMES, Nov. 24, 1988, at B3; *see also* Verdict Summary, *McCloud v. Fortune*, 510 F. Supp. 2d 649 (N.D. Fla. 2007), 2006 WL 1195092 (psychologist for 15-year-old girl strip searched by police testified that girl "now has fear of all authority figures .... cloistered herself after the search and has stopped socializing with friends and family.").

Strip searching of adolescents also implicates "some very specific gendered problems." *Finley*, *supra*, at 128. "Menstruating females, for instance, are likely to be even more self-conscious about their bodies." *Id.* Strip searching of females, and males as well, is also potentially worrisome because of the "similarities between strip searches by authority figures and prior incidents of sexual abuse." *Id.* The two factors that most highly correlate with trauma in sexual abuse cases are also present in child strip search cases: "the child's participation is usually coerced, and the searcher is invariably an adult." Jesse Ann White, *A Study of Strip Searching in Pennsylvania Public Schools and an Analysis of the Knowledge, Attitudes, and Beliefs of Pennsylvania Public School Administrators Regarding Strip Searching* 37 (Aug. 2000) (unpublished Ph.D.

dissertation, Temple University) (on file with the Temple University Graduate Board) (quotation marks omitted). The fact that a strip search is a one-time occurrence and that the child's body is "viewed rather than touched, do[es] not diminish the trauma experienced by the child." *Id.*

Beyond the immediate emotional impact of coercion, humiliation, and embarrassment, strip searches "label" students and "create stigmas that can be long-lasting," affecting the victims' relationship with their peers and school officials. *Finley, supra*, at 121. Most children and youth who have been strip searched at school experience "difficulties with relationships, including those with peers, educators, and family." *Id.* at 126. Clinical data also indicates that strip searches in which students are required to remove all or most of their clothes "are generally not very successful and tend to cause the greatest emotional turmoil." *Hyman & Perone, supra*, at 15. In short, strip searches are very likely to damage students emotionally and to undermine individual student morale.

The use of strip searches also can adversely affect the school environment, increasing student mistrust and alienation. *Hyman & Perone, supra*, at 15. Researchers have found that an "unwelcoming and highly inspected school environment," such as a school environment in which strip searches occur, "leads to more school misconduct as opposed to reducing it." Eisenbraun, *supra*, at 465.

Not surprisingly, strip searches also can potentially change "students' perceptions of school

staff from caregivers/educators to policemen/enforcers." *Hyman & Perone, supra*, at 15. In this case, the use of the school nurse to facilitate the strip search supports this "policemen/enforcer" perception in an especially detrimental manner, sowing mistrust and diminishing the likelihood that students will rely upon the school nurse and school officials in confidence. *Cf.* Helen Freake *et al.*, *Adolescents' views of helping professionals: A review of the literature*, 30 J. ADOLESCENCE 639, 646 (2007) (having medical and mental health professionals protect confidentiality and be kind, caring, and trustworthy are among the top five most important factors to adolescents in dealing with these professionals).

Moreover, it is clear that in this case, as in the cases described in the research, the strip search created significant emotional stress. As Savana Redding herself described, the strip search was both extremely intrusive and humiliating:

> I took off my clothes while they both watched. Mrs. Romero searched the pants and shirt and found nothing.
>
> Then they asked me to pull my bra out and to the side and shake it, exposing my breasts. Then they asked me to pull out my underwear and shake it. They also told me to pull the underwear out at the crotch and shake it, exposing my pelvic area.

J.A. 23a-24a, ¶¶ 19-20. Short of a body cavity search, forcing a thirteen-year-old girl to remove all of her clothes was the most intrusive search possible. And, consistent with the social science research in similar circumstances, the devastating emotional effect on Savana, and her resulting mistrust in school officials, is undeniable. As Savana stated:

> I was embarrassed and scared, but felt I would be in more trouble if I did not do what they asked. I held my head down so that they could not see that I was about to cry.
>
> ...
>
> The strip search was the most humiliating experience I have ever had. Mrs. Romero and Mrs. Schwallier did not look away while I was taking off my clothes. They did nothing to respect my privacy.
>
> ...
>
> I felt offended by the accusations made against me and violated by the strip search.

J.A. 24a-25a, ¶¶ 21, 28, 30.

Because strip searching children at school clearly does inflict damage, and in keeping with the basic tenet that children must be differentiated from adults, NASW urges that disciplinary practices in schools "must reflect the desire to shape students'

behavior toward productive participation in schools and society," and utilize a problem-solving process with parents and guardians. *Social Work Speaks, supra*, at 102. NASW also has found that an important positive health factor for adolescents is a school where staff members "create empathetic relationships with students and provide opportunities for youth to feel competent, valued, and respected." *Id.* at 4. Such school environments "enable youths to resist and overcome negative influences in their lives more effectively." *Id.* By contrast, as NASP has stated, "zero tolerance policies ha[ve] resulted in a range of negative outcomes with few if any benefits to students or the school community." Nat'l Ass'n of Sch. Psychol., *Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers*, at 3 (2008), at http://www.nasponline.org/educators/zero_alternative.pdf. The studies and analysis demonstrate that strip searches undermine students' productive participation in school, produce significant emotional harm, and damage relationships with peers and school officials.

B. States, School Boards, And Courts Have Agreed With Social Science Researchers That School Strip Searches Are Excessively Intrusive And Traumatic.

States and school boards have recognized the traumatic effects of schoolhouse strip searches and prohibited or severely restricted their use. At least seven states have prohibited such strip searches, including Wisconsin, which has criminalized their use by school officials. *See* Wis. Stat. § 948.50(3); *see*

also Cal. Educ. Code § 49050 (no body cavity search or inspection of "underclothing, breast, buttocks, or genitalia"); Iowa Code § 808A.2(4)(a) & (b) (no body cavity or strip search); Okla. Stat. tit. 70, § 24-102 (no strip search); N.J. Stat. Ann. § 18A:37-6.1 (no body cavity or strip search); S.C. Code Ann. § 59-63-1140 (no strip search); Wash. Rev. Code § 28A.600.230(3) (no body cavity or strip search). Likewise, individual school boards, including some in Arizona, have prohibited strip searches. *See, e.g.*, Mesa Unified School Dist. Governing Bd. Policy and Admin. Regs., Code JFG at 800 (rev. 1999), at http://www.mpsaz.org/policies/MPSpolicy.pdf (last visited Mar. 30, 2009); Scottsdale Unified School Dist. No. 48 Policy Manual, J-3400 JIH (2003), at http://lp.ctspublish.com/asba/public/lpext.dll/Scottsdl/1890/1cd1?fn=document-frame.htm&f=templates&2.0 (last visited Mar. 30, 2009). Indeed, New York, a city well aware of safety and security risks, is among those districts banning strip searches of students. New York City Dep't of Education, Regulation A-432 (2005), at http://docs.nycenet.edu/docushare/dsweb/Get/Document-21/A-432.pdf (last visited Mar. 30, 2009). Where they have not banned such searches altogether, some school districts have placed stringent limitations on their use. *See, e.g.*, Pitt County Board of Education, Policy 10.201 (2008), at http://www.pitt.k12.nc.us/boe/files/10/10.201-P_Search_and_Seizure_Procedures.doc (last visited Mar. 30, 2009) (permitting strip searches only where probable cause and when conducted by law enforcement outside presence of school officials); School Board of the City of Virginia Beach Regulation 5-65.1 (2001), at http://www.vbschools.

com/policies/5-65_1r.asp (prohibiting strip searches, but providing exception where student poses immediate danger by possessing item).

Courts nationwide and beyond also have recognized the severely intrusive and traumatic nature of strip searches. *See Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993) (strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.") (quotation marks omitted); *Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992) (same); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) ("a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience."); *R. v. Golden*, [2001] 3 S.C.R. 679 (Can.) ("strip searches ... are often a humiliating, degrading and traumatic experience").[2]

The potential trauma is of particular concern when children and adolescents are at issue. The common sense conclusion that a strip search of a young teenager at school is a uniquely invasive act was eloquently stated by the Seventh Circuit:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an

---

[2] More generally, clothing and lack thereof is of such psychological significance that it has been used affirmatively as an interrogation tool. *See* Central Intelligence Agency, *Kubark Counterintelligence Interrogation*, 86 (1963), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/#kubark (clothing of detainees taken because their clothing "reinforces identity and thus the capacity for resistance.").

> invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency.
>
> ...
>
> We suggest as strongly as possible that the conduct herein described exceeded the "bounds of reason" by two and a half country miles. It is not enough for us to declare that the little girl involved was indeed deprived of her constitutional and basic human rights. We must also permit her to seek damages from those who caused this humiliation and did indeed act as though students "shed at the schoolhouse door rights guaranteed by * * *any * * *constitutional provision."

Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980) (citation omitted); *see also Cornfield ex rel. Lewis v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993) ("no one would seriously dispute that a nude search of a child is traumatic"); *People v. D*, 315 N.E.2d 466, 471 (N.Y. 1974) ("psychological damage that would be risked on sensitive children by random [strip] search insufficiently justified by the necessities is not tolerable."). Courts have also recognized that adolescents are likely to suffer greater trauma from a strip search because, as they "go through puberty, they become more conscious of their bodies and self-conscious about them."

Cornfield, 991 F.2d at 1321 n.1. As this Court has stated, "[Y]outh .... is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

Thus, social science, state statutes, school regulations, and precedent all establish that a strip search of a child by school officials is excessively intrusive. And it has consequences that must be taken into account. Moreover, Petitioners and the United States agree. *See* Pet'r Br. at 34 ("Petitioners do not deny the emotional effect of the search conducted in this case."); U.S. Br. at 15 (strip search "creates a potential for trauma"). *Amici*, representing over 3.3 million professionals with an interest in child welfare and education, concur. Accordingly—as many states and school districts have concluded independently—under *T.L.O.*, such a schoolhouse search is only warranted, if ever, in a very narrow range of cases.

II. An Excessively Intrusive Search, Such As A Strip Search, Could Only Be Justified By A Heightened Quantum Of Suspicion.

A. The Reasonable Suspicion Determination Must Balance Immediate Risk To Health/Safety, Locational Specificity, Weight Of Available Evidence, And Possible Alternatives To The Search.

As this Court has long recognized, any search of a person is a "substantial invasion of privacy" that is unconstitutional unless conducted pursuant to the strictures of the Fourth Amendment. *T.L.O.*, 469

U.S. at 337. A search of a student's body or possessions "no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." *Id.* at 337-38. Still, the Court also has recognized the challenges faced by school officials in "maintain[ing] an environment in which learning can take place." *Id.* at 340. By making two limited exceptions—namely, excusing both the warrant requirement and "*strict* adherence to the ... probable cause" requirement—to Fourth Amendment procedures for school searches, *T.L.O.* articulated a standard that considered the needs of school officials while "ensur[ing] that the interests of students will be invaded no more than is necessary." *Id.* at 340-43 (emphasis added). Ensuring that a student's interests are invaded "no more than is necessary" requires that the quantum of school officials' suspicion increase as the level of intrusiveness of the search increases.

Therefore, whether any schoolhouse search is reasonable under the Fourth Amendment "will vary according to the context of the search." *Cornfield*, 991 F.2d at 1320. Schoolhouse searches must be "reasonably related to the objectives of the search and *not excessively intrusive in light of the age and sex of the student and the nature of the infraction.*" *T.L.O.*, 469 U.S. at 342 (emphasis added). Given their extremely intrusive nature, strip searches could only be authorized where a heightened quantum of suspicion is present. *See* Pet. App. 18a-19a; *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006) ("[T]he reasonableness of the suspicion [under *T.L.O.*] is informed by the very intrusive nature of a

strip search, requiring for its justification a high level of suspicion.") (internal citation omitted); *Cornfield*, 991 F.2d at 1321 ("[A]s the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness."). Therefore, what may constitute reasonable suspicion for a pocket or locker search "may fall well short of reasonableness for a nude search." *Cornfield*, 991 F.2d at 1321. Four factors inform the heightened quantum of suspicion that is required as the intrusiveness of a school search increases.

First, as the United States agrees in its amicus brief, *T.L.O.*'s mandate to consider the intrusiveness in light of the "nature of the infraction" indicates that a highly intrusive search, such as a strip search, could be used only, if at all, to locate items that pose an immediate and serious risk to health or safety. *See* Brief of United States at 18; *see also Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1168-69 (11th Cir. 2001) (concluding that given "the important privacy interests at stake and the intrusive nature of the searches, school officials must have possessed a truly important interest that would have otherwise been endangered in order to justify" a strip search), *vacated for reconsideration*, 536 U.S. 953 (2002), *reinstated* 323 F.3d 950 (11th Cir. 2003); *Cornfield*, 991 F.2d at 1320 ("a highly intrusive search in response to a minor infraction" would violate *T.L.O.*); *Jenkins by Hall v. Talladega City Board of Education*, 115 F.3d 821, 834 (11th Cir. 1997) (Kravitch, J., dissenting) (citing *Justice*, 961 F.2d at 193) ("Strip searching a student is permissible only in extraordinary cases and only to prevent imminent

harm."). This must be a fact-based inquiry that focuses on actual and imminent danger, not whether a broad "category" of some potential danger is implicated. *See T.L.O.*, 469 U.S. at 341 (inquiry requires examination of "all the circumstances").

The mere suspected presence of some form of contraband does not qualify as an immediate danger to health or safety. For instance, "Immediacy of action [to discover marijuana] is not as necessary as could be found with a tip regarding a weapon." *In re K.C.B.*, 141 S.W.3d 303, 309 (Tex. Ct. App. 2004) (anonymous tip about marijuana did not warrant strip search of student). Here, the Ninth Circuit correctly considered the actual danger posed by the medication in question and found that it posed "an imminent danger to no one." Pet. App. 29a. Though this Court stated that judges "should, as a general matter, defer" to schools regarding rules that are "important to preservation of order," it has never suggested that a Fourth Amendment analysis should disregard the facts at hand to find an immediate danger where none exists. *T.L.O.*, 469 U.S. at 341-42 & n.9. Rather, *T.L.O.*'s mandate to examine all the circumstances requires a careful consideration of the actual facts indicating immediate danger, lest courts countenance the trauma and consequences of a strip search where no such danger exists.

Second, because *T.L.O.* prohibits "excessively intrusive" searches, a severely intrusive search must be justified by specific evidence indicating that the contraband will be detected by means of the contemplated search. As acknowledged by the United States, *T.L.O.* requires this locational

specificity in addition to immediate danger. *See* U.S. Br. at 15-17. The Ninth Circuit appropriately recognized the lack of such evidence here. Pet. App. 26a-27a (distinguishing *Cornfield* where "most importantly, the information provided a basis to believe that a strip search was necessary to reveal the contraband."); *Cf. Cornfield*, 991 F.2d at 1319 (school officials directly observed suspicious object in crotch area). Without specific evidence that a student is concealing contraband in a place where a strip search would be necessary to reveal it, such a search cannot be "reasonably related to the objectives of the search" consistent with the prohibition on being "excessively intrusive." *T.L.O.*, 469 U.S. at 342.

Third, to ensure that highly intrusive searches are not "excessively intrusive," *T.L.O.* requires that a heightened weight of evidence support the first two factors enumerated here. Thus, this third factor requires an examination of the nature and reliability of the evidence indicating the presence of dangerous contraband as well as the specific location of the contraband. The question is whether a heightened weight of evidence supports both an immediate threat to health or safety and the concealment of contraband in an area implicating the need for a strip search.

For instance, suspicion that largely relies on an uncorroborated student tip may fall short of the necessary proof. *See, e.g.*, *Phaneuf*, 448 F.3d at 598 ("[Principal's] acceptance of one student's accusatory statement to initiate a highly intrusive search of another student with no meaningful inquiry or

corroboration-concerns us."); *Fewless ex rel. Fewless v. Bd. of Educ.*, 208 F. Supp. 2d 806, 818 (W.D. Mich. 2002) (constitutional school searches "include the presence of more evidence and evidence of greater reliability than the instant case."). This heightened weight of evidence is necessary before the Fourth Amendment will allow such bodily intrusion. *See Phaneuf*, 448 F.3d at 596; *Cornfield*, 991 F.2d at 1321-23; *see also T.L.O.*, 469 U.S. at 347 (suspicion was "substantial enough" to justify intrusive examination of letters where pipe, plastic bags, marijuana, substantial amount of money, and list of debtors were found in purse). As the Ninth Circuit held, this "heavy burden is necessary to justify a [strip] search accurately described ... as 'de-meaning, dehumanizing, undignified, humiliating, terrifying, unpleasant [and] embarrassing.'" Pet. App. 23a (quoting *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983)).

Finally, the fourth factor requires consideration of any alternatives that would neutralize the immediate risk to health and safety and avoid the potential trauma of an intrusive strip search. *See* Pet. App. 23a-24a, 32a (finding that school officials could have conducted additional investigation and sent Savana home to neutralize threat); *Jenkins by Hall*, 115 F.3d at 833 (Kravitch, J., dissenting) (strip search excessively intrusive where "other reasonable, minimally intrusive options were available."). *T.L.O.* requires that, when searching students, the "interests of students will be invaded no more than is necessary." *T.L.O.*, 469 U.S. at 343. This requirement demands that alternatives to a highly

intrusive search be considered, ensuring that such a search—where otherwise warranted—is a truly necessary invasion of students' interests. Therefore, given the highly intrusive nature of strip searches, they are "excessively intrusive" and unnecessarily invasive under *T.L.O.* where other alternatives to neutralize the threat are available.

Amici recognize that weapons could certainly pose an immediate threat to health or safety. Yet, even where weapons are suspected, a strip search would not be justified if the suspected weapon is not likely to be hidden in underwear, or if the clothes the student is wearing could not hide the weapon. Indeed, a (hand-held) metal detector should often be able to confirm whether a weapon is present. Likewise, if a weapon might be located in pockets, shoes or socks, a search of that limited scope should be conducted before considering a strip search.

And where the suspected contraband is dangerous drugs that pose an immediate threat to safety, that danger may often be neutralized by separating and supervising the student pending additional investigation. *See In re K.C.B.*, 141 S.W.3d at 309 (distinguishing drugs from threat of weapon). Less intrusive avenues for search, such as searching backpacks, lockers, and pockets, should be pursued first. *See Phaneuf*, 448 F.3d at 598-99 ("While the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search."); *Fewless*, 208 F. Supp. 2d at 817 (school official did not speak with other students, teachers or Fewless's parents, nor did

he search Fewless's locker prior to ordering the strip search). Where suspicion remains, school officials generally can neutralize any danger posed by drugs by isolating the student, placing the student under supervision, and/or transferring the student to the custody of their parents. *See* Pet. App. 32a. Such measures can balance the interest in meeting the safety needs of the school without the significant trauma of a strip search. Indeed, they are required by the constitutional obligation to balance "the need to search against the invasion which the search entails." *T.L.O.*, 469 U.S. at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

These four factors must also be weighed in the context of the caregiver relationship of teachers and school administrators, who are entrusted to "do no harm." As this Court has often recognized, schools serve a "fundamental role in maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). "[P]ublic school officials ... act in furtherance of publicly mandated educational and disciplinary policies" and are entrusted with the well-being of students. *T.L.O.*, 469 U.S. at 336. Given this critical role, it is self-apparent that school officials should not affirmatively cause harm. *See, e.g.*, Gary B. Melton & Janet Corson, *Psychological Maltreatment and the Schools: Problems of Law and Professional Responsibility*, 16 Sch. Psychol. Rev. 188, 192 (1987) ("[P]rotection from psychological harm is consistent with the state's interest in the healthy socialization of children"); Nat'l Ass'n of Sch. Psychol., *Position Statement: Children's Rights*, at 2 (2003), at http://www.nasponline.org/about_nasp/positionpaper

s/ChildrensRights.pdf ("School discipline [should be] administered in a manner consistent with a child's human dignity and basic rights.").

In sum, pursuant to *T.L.O.*, school strip searches are a severe invasion of the privacy of children that are rarely, if ever, justified. For "[a]lthough students may surrender some expectations of privacy when they enter the schoolhouse door, an expectation that they will be free from forced strip searches is not one of them." *Thomas*, 261 F.3d at 1168. As social science research, seven states, and courts have recognized, strip searches can inflict profound psychological and emotional damage on children. Thus, strip searches are not only a shocking affront to the privacy of children, but also an affront to their very well-being. Consistent with the thoughtful balancing of *T.L.O.* and the four factors articulated here, *amici* urge the Court to affirm that the Constitution will not easily, if ever, tolerate compelling our children to strip at school.

B. The Decision To Strip Search Savana Was Wholly Unjustified Under *T.L.O.*

Even if a school strip search of a 13-year-old girl might be justified in some extreme circumstances, it was certainly not justified here. To the contrary, the uncorroborated tip of a self-interested student – which did not even suggest that the medication might be hidden under Savana's clothes—was not close to adequate grounds to conduct the strip search. The fact that alternatives to strip searching were ignored only emphasizes the unquestionable Fourth Amendment violation here.

Considering the first factor, Savana posed no immediate threat to health or safety. While Ibuprofen (in either prescription strength or over-the-counter strength) may have been proscribed at school, it is nonetheless relevant to the reasonableness of the search that the "nature of the infraction" here involved the possible possession by a 13-year-old girl of a medication commonly used to relieve menstrual cramps.[3]

Considering the second factor, there is no evidence indicating the concealment of contraband in an area implicating the need for a strip search. Indisputably, there was no specific evidence whatsoever that Savana was concealing pills under her clothes. *See* Pet. App. 6a-9a; U.S. Br. at 20-22.

---

[3] Unlike the "drug search" cases relied on by the Ninth Circuit panel decision, there was no suspicion that Savana was in possession of a dangerous, non-medicinal drug. *Cf. Cornfield*, 991 F.2d at 1322 (suspicion of "crotching drugs" like marijuana and cocaine); *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 882 (6th Cir. 1991) (suspicion of white powder and a volatile substance called "rush"). Instead, the only two drugs ever referenced were Ibuprofen and Naprosyn. As Assistant Principal Wilson acknowledged, the blue Naprosyn tablet found is an over-the-counter medication. *See* J.A. 13a, ¶ 13. Notably, treatment of menstrual cramps is among Naprosyn's approved uses for adolescents. *See The Harriet Lane Handbook, A Manual for Pediatric House Officers* 892 (Jason Robertson & Nicole Shilkofski eds., The Johns Hopkins Hospital, 17th ed. 2005). Moreover, the dosage of the pill found on the other girl, 200 mg, is within the recommended dosage range for treatment of menstrual cramps. *See id.* (stating recommended dosage as 250 mg every 6-8 hours). Likewise, 400 mg of Ibuprofen is an approved dosage for the treatment of menstrual cramps. *See id.* at 840. It is also the equivalent of two standard over-the-counter Ibuprofen tablets.

For this reason alone, the strip search of Savana violated the dictates of *T.L.O.* and the Fourth Amendment. U.S. Br. at 21-22.

Considering the third factor, there is nothing approaching a heightened weight of evidence to support the suspicion here. Indeed, there is even less basis to conduct a strip search here than in *Phaneuf*, *Fewless*, and numerous other cases. Here, the evidence offered to justify the strip search is: 1) a student, Jordan, who had admitted inappropriate drug use to school officials only a week earlier, gave assistant principal Kerry Wilson a 400 mg Ibuprofen tablet that he said another student, *Marissa*, had given to him and told Wilson that a group of students were planning to take pills at lunch; 2) Wilson had *Marissa* empty her pockets and wallet, finding several more pills; 3) when asked where the blue pill came from, *Marissa said* that Savana gave her the pills. *See* Pet. App. 3a-9a. Savana denied having possessed or distributed any pills at school and the search of her backpack revealed no contraband. J.A. 22a-23a, ¶¶ 11-16.

Similar to *Phaneuf* and *Fewless*, the only actual "evidence" of drug possession *by Savana* is the statement of a single student who was already in trouble for possessing medication. There is no evidence that this student, with an obvious motive to get herself out of trouble by blaming someone else, should be deemed credible.

First, there is no indication in the record that Wilson questioned Marissa about the veracity of her accusation or the depth and status of her alleged

friendship with Savana. Second, at no point in Wilson's affidavits does he state that he found Marissa credible, whether because of her alleged friendship with Savana or for any other reason. Third, as in *Fewless*, Wilson did not question other students or teachers regarding Marissa's accusation and did not search Savana's locker, nor did any adult report any suspicious behavior by Savana. And, as in *Fewless,* there was a powerful ulterior motive of the student tipster that went ignored: when caught with forbidden medication in the assistant principal's office, it would not be surprising if a middle school student accused someone else rather than accept guilt.

Nor can the planner noted in the panel discussion provide any support for the strip search. First, the planner was found near Marissa's desk, not with Savana. Only through a twisted fallacy does *Marissa's* possession of a planner containing *Marissa's* contraband (not including the medication) become evidence of Savana's possession of medication so as to justify a strip search. Not only is this a prohibited "vault" from one type of contraband to another, *see Phaneuf*, 448 F.3d at 600, but also it is a transfer of suspicion from *Marissa*, who actually possessed the contraband, to Savana, who was only "guilty" of lending Marissa a planner.

Additionally, although Petitioners have attempted to make much hay of "unusually rowdy behavior" and a student tip/rumor of Savana serving alcohol prior to a school dance months earlier, these allegations do not legitimately support any reasonable suspicion of Savana distributing

medication at school or hiding it in her clothes. First, if teenagers being "rowdy" offered justification to strip search them, the Fourth Amendment would have to exclude teenagers from protection altogether. Second, the rumor of serving alcohol was flatly denied by April Redding, Savana's mother, and never corroborated. *See* J.A. 11a, ¶¶ 5-6. Finally, even if the rumor were true, serving alcohol prior to a school dance months earlier provides no more evidence of possessing Ibuprofen at school than possession of cigarettes provides evidence of marijuana possession. *See Phaneuf*, 448 F.3d at 600. The former simply provides no support for reasonable suspicion of the latter.

Considering the fourth factor, school officials ignored alternatives to a strip search to neutralize any potential immediate danger. The purported exigency in this situation was the statement from Jordan to Wilson that "a group of students was planning on taking the [Ibuprofen] pills at lunch." J.A. 11a, ¶ 7. Again, there is simply no corroboration for this statement made by a single student. Nor is there any indication that school officials attempted to identify who was in this group, or that they took any steps to stop them. Rather than resorting to a strip search, school officials could have monitored the situation at lunch and then questioned any students seen to be forming such a group. As to Savana specifically, school officials could have called her parents and sent her home for the day. They also could have questioned her teachers as to whether she exhibited suspicious behavior and possibly searched any locker or desk drawer she may have had.

In short, rather than conducting a strip search under the circumstances here, the constitutional course of action under *T.L.O.* is to investigate and potentially conduct a limited, less intrusive search of personal items and pockets. *See, e.g., Bravo ex rel. Ramirez v. Hsu*, 404 F. Supp. 2d 1195, 1201-02 (C.D. Cal. 2005) (following tip from student and bathroom monitor regarding drug possession by eighth grade girl, assistant principal searched her backpack, pockets, and shoes, but "[t]he search was not excessively intrusive in light of [the girl's] age and sex: [the girl] was not asked to disrobe or physically touched."); *see also Sostarecz v. Misko*, No. Civ. A. 97-cv-2112, 1999 WL 239401, at *6 (E.D. Pa. Mar. 26, 1999) (finding that where nurse tests of vital signs and pupils of student suspected of drug use were normal, no "reasonable person would then force the student" to submit to a strip search). Of course, it would be easier if school officials could simply search every student accused by anyone of possessing contraband regardless of circumstance, just as it would be easier for police to strip search anyone they might think has contraband. But such methods, while administratively easier, do not comport with the Fourth Amendment. Moreover, school officials, unlike law enforcement, must balance the likelihood that they will harm those entrusted to their care against the desire to take every possible precaution for safety and order at school.

Accordingly, the question for the Court is whether a mere suspicion that an honors student with no disciplinary problems might have Ibuprofen (even

though none was found in her backpack), based on an uncorroborated tip without locational specificity from another student already in trouble for possessing the same medication, justifies a strip search that exposed a thirteen year-old girl, subjecting her to immediate humiliation and embarrassment, and to emotional and social trauma. If children retain any right to privacy at the schoolhouse, as this Court has repeatedly stated they do,[4] the answer must be a resounding no. Under *T.L.O.*, this Court should find that the strip search of Savana Redding was unreasonable and in violation of the Fourth Amendment.

---

[4] *See Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 2622 (2007) ("[S]tudents do not 'shed their constitutional rights ... at the schoolhouse gate.'") (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Carolyn I. Polowy
Sherri Morgan
NATIONAL ASSOCIATION OF SOCIAL WORKERS
750 First St., NE, Suite 700
Washington, DC 20002
(202) 336-8282

Michael D. Simpson
NATIONAL EDUCATION ASSOCIATION
1201 Sixteenth St., NW
Washington, DC 20036
(202) 822-7035

Julia M. Carpenter*
Michael A. Hoffman
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, DC 20001
(202) 639-6000

*Counsel of Record

April 1, 2009

AMICUS CURIAE BRIEF

122 (8)

FILED
MAR 4 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-479

IN THE

SUPREME COURT OF THE UNITED STATES

SAFFORD UNIFIED SCHOOL DISTRICT #1; KERRY WILSON, HUSBAND; JANE DOE WILSON, WIFE; HELEN ROMERO, WIFE; JOHN DOE ROMERO, HUSBAND; PEGGY SCHWALLIER, WIFE; JOHN DOE SCHWALLIER, HUSBAND,
Petitioners,

v.

APRIL REDDING, LEGAL GUARDIAN OF MINOR CHILD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF PETITIONERS

Francisco M. Negrón, Jr.
General Counsel
Thomas E.M. Hutton
National School Boards Ass'n
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722
*Counsel of Record

David R. Day*
Séamus P. Boyce
Church Church
Hittle & Antrim
12514 Reynolds Drive
Fishers, IN 46038
(317) 773-2190

TC 4TH 4DKL 2V

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. THE FOURTH AMENDMENT PERMITS PUBLIC SCHOOL EDUCATORS TO CONDUCT REASONABLE SEARCHES OF STUDENTS 5

A. The Court should decide the matter on its merits and provide clarification on the *T.L.O.* individualized suspicion standard .. 5

B. The Ninth Circuit's decision on the merits should be reversed for misapplying the *T.L.O.* standard 12

1. The Court should clarify the justified-at-inception prong and in doing so, correct the error made by the Ninth Circuit 12

2. This Court should clarify the reasonable-in-scope prong and, in particular, emphasize judicial deference to educator risk assessments made pursuant to the nature-of-the-infraction factor 16

II. UPHOLDING THE NINTH CIRCUIT'S DECISION REGARDING QUALIFIED IMMUNITY WILL HAVE A CHILLING EFFECT ON EDUCATORS AND IMPLICATIONS FOR STUDENT SAFETY. 27

CONCLUSION **32**

TABLE OF AUTHORITIES

Page

Cases

Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls, 536 U.S. 822 (2002) 2, 3, 6, 19

Beard v. Whitemore Lake Sch. Dist., 402 F.3d 598 (6th Cir. 2005) 28

Brosseau v. Haugen, 543 U.S. 194 (2004) 28

C.B. v. Driscoll, 82 F.3d 383 (11th Cir. 1996) 7, 16, 29

Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) 8, 9, 29, 30

Hope v. Pelzer, 536 U.S. 730 (2002) 28

Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997) 29

Malley v. Briggs, 475 U.S. 335 (1986) 27

Morse v. Frederick, 127 S.Ct. 2618 (2007) 3, 20, 31

New Jersey v. T.L.O.,
469 U.S. 325 (1985) ..... passim

Pearson v. Callahan,
129 S.Ct. 808 (2009) 3, 9, 10, 11

Redding v. Safford Unified Sch. Dist. #1, 531 F.3d 1071 (9th Cir. 2008) 4, 8, 22

Rudebuch v. Hughes,
313 F.3d 506 (9th Cir. 2002) 28

Rudolph ex rel. Williams v. Lowndes County Bd. of Educ.,
242 F. Supp. 2d 1107 (M.D. Ala. 2003) 29, 30

Saucier v. Katz,
533 U.S. 194 (2001) 9, 11, 27, 28

Singleton v. Bd. of Education USD 500,
894 F. Supp. 386 (D. Kan. 1995) 8, 31

Terry v. Ohio,
392 U.S. 1 (1968) 7

Vernonia Sch. Dist., 47 v. Acton,
515 U.S. 646 (1995) ..... passim

Williams v. Ellington,
935 F.2d 881 (6th Cir. 1991) 7, 28, 30

Wilson v. Layne,
526 U.S. 603 (1999) 31

Other Authorities

Arizona Republic, *Gilbert unites to fight teen drug use* (May 8, 2004) 26

Arkansas Leader, *Overdoses concern parent* (December 17, 2007) 26

Colorado Springs Gazette, *Heroin investigation targets high school* (December 16, 2008)..... 25

ConnectMidMichigan.com, *Midland cracks down on teen drug use* (February 25, 2009) 25

Daily Herald, *Kids taking drugs early and what they're using to get high may surprise you* (May 29, 2006)..... 26

Dallas Morning News, *Destroyed by doping: Taylor's story, In the end, drugs' wrath proved stronger than he was* (June 5, 2005)..... 26

Des Moines Register, *Prescription drugs cited in south-side teen death* (February 12, 2009) 25

Detroit News, *Teen abuse of cold drug on the rise,* (March 14, 2002) 26

Monitor the Future, *2008 Survey Results* (December 11, 2008)..... 21, 23

National Institute on Drug Abuse, *Prescription and Over-the-Counter Medications* (July 2008)..... 22

Office of Juvenile Justice and Delinquency Prevention, *Juvenile Arrests 2006, 3* (November 2008)..... 19

Office of National Drug Control Policy, *Females Bucking Traditional Drug Abuse Trends: Teen Girls, Young Women Now Outpace Male Counterparts for Prescription Drug Abuse, Dependence* (April 30, 2007)..... 22

Office of National Drug Control Policy, *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (January 2008).....21, 22, 23

Office of National Drug Control Policy, *The President's National Drug Control Strategy* (January 2009) 21, 22

Omaha World-Herald, *Prescription-drug abuse is a growing problem among students* (March 15, 2007)..... 26

Orange County Register, *Campus overdose puts 3 in hospital—Fountain Valley High students are hospitalized* (December 15, 2005) 26

Pittsburgh Post-Gazette, *Kids' abuse of over-the-counter cold medicine on the rise* (March 21, 2005)..... 26

Rocky Mountain News, *'Pharming' a growing fear – Some school districts are seeing a 'scary' increase in the dangerous trend of abusing prescription and over the counter pills* (March 5, 2008) 25

Sacramento Union, *Prescription Drug Overdose Sparks Fear* (May 18, 2005) 26

Sarasota Herald Tribune, *Teen's body found in ditch* (December 24, 2000) 26

Star Tribute, *No charges filed in teen's overdose on pain drug* (May 17, 2005) 26

Syracuse Post-Standard, *Teens' Abuse of Pills Worsens* (November 6, 2008) 25

This Week, *Abuse of over-the-counter drugs posing danger for young users* (January 22, 2004) 26

Times Leader, *Lyon students press for school drug testing* (January 21, 2008) 25

Transcript of Oral Argument at 49-50, Morse, 127 S. Ct. 2618 32

Ventura County Star, *Drug mix may have killed teen in Ventura* (April 13, 2007) 26

USA Today, *Youths risk death in latest drug abuse trend* (December 29, 2003) 26

Washington Post, *Household Medicine Abused by The Young* (October 8, 2004) 26

WSAZ NewsChannel 3, *High School Student Overdoses on Xanax* (September 28, 2007) 26

INTEREST OF *AMICI CURIAE* [1]

The National School Boards Association ("NSBA") is a nonprofit organization representing state associations of school boards, as well as the Hawai'i State Board of Education and the Board of Education of the U.S. Virgin Islands. NSBA represents over 95,000 school board members who govern over 14,000 local school districts serving about 49.8 million students.

The American Association of School Administrators ("AASA") is the professional organization for more than 13,000 local school system leaders. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children.

Amici have a strong interest in ensuring that school leaders have the ability to respond to student drug abuse in an effective manner through educational efforts and other appropriate interventions that may include student searches. *Amici* believe that school officials should be afforded legal clarity and appropriate deference when making

---

[1] Pursuant to Sup. Ct. R. 37.6, amici note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. R. 37.3, counsel further notes that counsel of record for the parties have consented to the filing of this brief.

on-the-spot decisions that require the balancing of student privacy with the need to ensure a safe and orderly learning environment for all students. The Ninth Circuit's ruling sharply limits the ability of school leaders to meet this responsibility without risk of personal liability.

SUMMARY OF ARGUMENT

Twenty-four years ago this Court, in *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985), rejected efforts to impose a warrant requirement and probable cause standard on searches by public educators. The Court recognized that the need for efficient school administration undertaken to preserve a safe school environment and to protect students from serious health risks required a more flexible "reasonable suspicion" standard to evaluate the constitutionality of school searches. While this Court has reviewed other student search cases since *T.L.O.*, namely *Board of Education of Independent School District No. 92 of Pottawatomie v. Earls*, 536 U.S. 822 (2002) and *Vernonia School District, 47J v. Acton*, 515 U.S. 646 (1995), those cases did not involve searches based on individualized suspicion of a specific student.

Contradiction in lower court precedent applying *T.L.O.* demonstrates the need to decide this case on its merits and clarify the application of *T.L.O.* to searches that extend beyond the facts of that case. Otherwise, lower courts likely will continue to confuse matters through the development of a jurisprudence that frustrates the ability of educators to effectively address a myriad of

student behaviors that create potential harm for our nation's youth. Further, in light of its recent decision in *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009), the Court is in the unique position of deciding this case on its merits, where a case involving the *T.L.O.* standard is unlikely to reach this Court in the near future because student searches cases are inherently circumstantial.

Not only can this Court clarify *T.L.O.*, it also could render a decision that gives direction to educators on how properly to apply the justified-at-inception and the reasonable-in-scope prongs established in that case. The Ninth Circuit misapplied *T.L.O.* when it blurred the line between these separate and distinct analyses. As enunciated in *T.L.O.*, the type of student misconduct at issue is only relevant to the nature-of-the-infraction factor under the second prong. The Court has the opportunity to clarify the two-step process for conducting reasonable searches.

This case also presents the opportunity for this Court to correct the Ninth Circuit's departure from a long line of decisions that accord a degree of deference to educators who administer our nation's schools. This tradition of deference animated the decisions in *T.L.O.*, *Acton*, and *Earls* and most recently was reaffirmed in *Morse v. Frederick*, 127 S. Ct. 2618, 2623 (2007). Deference to educators' judgments recognizes that the role of the courts in school administration should necessarily be limited in order to avoid placing unwise constraints on the ability of school officials to preserve the learning environment and protect the safety of students. Here, in contrast, the Ninth Circuit trivialized the

dangers posed by the non-medical use of prescription and over-the-counter ("OTC") drugs by students. *See Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071, 1085 (9th Cir. 2008) (suggesting that prescription grade ibuprofen does not pose "an imminent danger" to anyone). Recent reports, however, highlight a much more alarming trend with respect to prescription and OTC drug abuse—precisely the kind of trend to which educators are highly attuned.

Finally, the Ninth Circuit's misunderstanding and misapplication of *T.L.O.* all but predetermined its erroneous conclusion that the educator in this case was not entitled to qualified immunity because the law was clearly established at the time of the search. Not only is this conclusion wrong as a matter of law, but it also has the undesirable effect of holding educators personally liable for making decisions of constitutional import on which even experienced jurists cannot agree. This unfairly places educators in the position of being sued and held personally responsible for good faith decisions intended to protect the health and safety of the students entrusted to their care. This outcome demonstrates the critical need for clear guidance from this Court regarding the appropriate balance under the Fourth Amendment between the individual privacy rights accorded a particular student and the compelling interest of schools in maintaining a safe and healthy learning environment for all students.

ARGUMENT

I. THE FOURTH AMENDMENT PERMITS PUBLIC SCHOOL EDUCATORS TO CONDUCT REASONABLE SEARCHES OF STUDENTS.

A. The Court should decide the matter on its merits and provide clarification of the *T.L.O.* individualized suspicion standard.

Amici acknowledge and respect this Court's discretion not to render a decision on the merits where qualified immunity disposes of the case. The Court did, however, grant *certiorari* on both the merits and qualified immunity questions presented. Prior to oral argument, both parties and all *amici* will have fully briefed both questions. Further, as the leading organizations that assist educators in developing constitutionally and otherwise legally sound policy, *Amici* respectfully request this Court to provide public school educators with the interpretive guidance of the *T.L.O.* standard that has been lacking since the case was decided in 1985.

The decision in *T.L.O.* was instrumental in the development of the "special needs" doctrine, which recognizes that probable cause and warrant requirements are not required in all circumstances. 469 U.S. at 351 ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers"). Since *T.L.O.* was decided, this Court has recognized several other

circumstances where neither probable cause nor a warrant is necessary to conduct a reasonable search. *E.g.*, *Acton*, 515 U.S. 646 (suspicionless urinalysis testing of student athletes is reasonable); *Earls*, 536 U.S. 822 (suspicionless urinalysis testing of students who participate in extracurricular activities is reasonable); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (blood and urinalysis testing of railroad employees without warrant or probable cause is reasonable); *Griffin v. Wis.*, 483 U.S. 868 (1987) (searches of probationer's home based on reasonable suspicion are reasonable). These decisions do not, however, provide interpretation of the *T.L.O.* standard. Even though *Acton* and *Earls* both involve student searches, the suspicionless drug testing standard is distinct from the reasonable suspicion standard from *T.L.O.* Therefore, lower courts are effectively limited to interpreting the *T.L.O.* standard through citation to *T.L.O.* and other lower court decisions.

In *T.L.O.*, this Court appropriately recognized that school officials responsible for maintaining safe and orderly learning environments need more flexibility than the probable cause standard under the Fourth Amendment generally permits. To provide this flexibility, the Court adopted a reasonable suspicion standard that accords deference to the judgments of school personnel in making risk assessments regarding the students suspected of violating school rules or the law. While this ruling thus eased the constitutional burdens on school leaders, the practical application of *T.L.O.* has led to confusion among both judges and educators.

The first prong of the *T.L.O.* test requires courts to assess whether the search was justified at

its inception. The lower courts' inconsistent application of this prong has resulted in the sending of mixed messages to educators as to how they must evaluate information about alleged student misconduct that raises health and safety concerns and determine an appropriate course of action. *Compare Williams v. Ellington*, 935 F.3d 881, 887-89 (6th Cir. 1991) (using the "quantity and quality" stop approach set forth in *Terry v. Ohio*, 392 U.S. 1 (1968)), to determine that student informant tips were comparable to anonymous informant tips and must be corroborated) *with C.B. v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996) (ruling that student informants are inherently more reliable than other informants because, if student informants provide inaccurate information, they are subject to discipline themselves). Here, the assistant principal received relevant information from both students and adults and knew of past incidents of student drug abuse that caused serious bodily harm. However, in the Ninth Circuit's estimation, the assistant principal did not have sufficient basis for conducting a search of the student's clothes to find the drugs students were reportedly planning to ingest hours later.

Another area of confusion arises from the justified-at-inception prong of the *T.L.O.* test as applied to searches with varying levels of privacy intrusion. Here, for example, the educators were looking for prescription pills—obviously a small item that could easily be concealed. Only after the initial minimally intrusive attempts turned up nothing did the search progress. Pursuant to the Ninth Circuit's decision, both educators and courts must continuously re-assess the propriety of the search, using the justified-at-inception analysis, whenever

the level of intrusion escalates during the search. *Redding*, 531 F.3d at 1081-85. Nothing in *T.L.O.* mandates a new level of inquiry under the justified-at-inception prong as the search progresses unless new evidence is found along the way.

The second part of the *T.L.O.* test, reasonable-in-scope, also has led to confusing and divergent guidance. When the objective of the search is to determine whether the student has concealed small items, especially items with potential for harm, then the search may need to be more intrusive to detect the items. The lower courts have recognized this practicality. *See, e.g., Cornfield v. Consol. High Sch. Dist. No. 230*, 911 F.2d 1316, 1323 (7th Cir. 1993) (strip search to find drugs reasonable in scope where educators observed student undress from a distance and did not physically touch student); *Singleton v. Bd. of Educ. USD 500*, 894 F. Supp. 386, 388-89, 91 (D. Kan. 1995) (strip search to find stolen $150 reasonable in scope where educators did not require student to remove underwear and did not perform body cavity searches). The Ninth Circuit's opinion, however, rejects this recognition, broadly calling into question the ability of school officials to make all practical searches—both minimally intrusive and more intrusive. Without clarification of the reasonable-in-scope prong, educators will be hindered in their ability to enforce rules that prohibit possession of potentially dangerous, small items such as drugs.

The *T.L.O.* decision included analyzing the "nature of the infraction" as part of its framework for determining the constitutionality of school searches, but the *T.L.O.* Court explicitly declined to preclude certain infractions that some might regard as too

"trivial." 469 U.S. at 342 n.9 (stipulating that nature-of-the-infraction factor does not permit courts to alter reasonable suspicion standard because they believe some student misconduct to be trivial). The federal courts have provided scant guidance to educators regarding the application of the "nature of the infraction" factor. *See, e.g., Cornfield*, 991 F.3d at 1320 (highly intrusive search in response to minor infraction unreasonable). The Ninth Circuit's application of this factor seems directly at odds with what the *T.L.O.* Court had in mind. Despite this Court's admonition to avoid second-guessing educators about the importance of particular school rules, the Ninth Circuit simply dismissed the importance of the educator's concerns for student safety here. That attitude colored the entire decision.

Unless the Court renders a decision on the merits of the first question presented in this case, *Amici* believe that the continuing confusion will have the practical effect of deterring educators from exercising their duty to prevent harm in the school environment. As it stands now in the Ninth Circuit, educators lack the guidance and flexibility they need to make on-the-ground judgments to protect student safety. Rather than being guided by judicial clarity, they are subject to judicial second-guessing pursuant to a confused standard.

The Court's decision on whether or not to decide this case on its merits comes at an interesting time, when it has just recently ended the order-of-battle experiment from *Saucier v. Katz*, 533 U.S. 194 (2001). *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009) (holding that whether to decide a case on its merits when it can be disposed of on basis of qualified immunity is purely discretionary on the

part of district courts and courts of appeals). This Court's decision in *Pearson* should not preclude a decision in this case, for two reasons. As an initial matter, the holding from *Pearson* applies only to district courts and courts of appeal, not this Court. *Id. Pearson* does not change the fact that this Court maintains discretionary jurisdiction over all cases for which it grants *certiorari*.

Even more compelling is that the relevant factors set forth in *Pearson* itself highly favor a decision on the merits in this case. *Pearson's* primary concern is judicial economy. This Court recognized that the order-of-battle requirement had the undesirable effect of creating irrelevant case law when the lower courts could have been directing their attention to cleaning up docket backlog. *See id.* at 818 ("The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."). Judicial economy should not be an issue at this stage in the proceedings of this case. While *Amici* acknowledge this Court's judicial restraint in seeking to answer only those questions that require answering, only this Court can provide the guidance necessary to ameliorate the abounding confusion regarding the application of *T.L.O.* Given the confusion among lower courts and the fact that nearly a quarter of a century has elapsed since this Court rendered a decision involving student searches based on reasonable suspicion, there can be no real argument that judicial economy dictates a decision here based merely on qualified immunity. *See id.* ("the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise

in cases in which a qualified immunity defense is unavailable"). The merits having been argued all the way to this Court, this case clearly exemplifies those "in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the 'clearly established' prong." *Id.*

Amici reach this conclusion despite their agreement with the decision in *Pearson*—and despite the dramatically evident appropriateness of granting qualified immunity in this case. See *infra* at II. Regrettably, individual educators often are named in litigation. For these educators, the order-of-battle requirement was not only time-consuming but costly, as they were often forced to fund the briefing of the merits portion of the proceeding when the case could easily have been disposed of on qualified immunity grounds alone. *See id.* at 818 (encouraging lower courts to not decide cases on their merits if there is qualified immunity because the "[u]nnecessary litigation of constitutional issues also wastes the parties' resources."). *Amici* applaud the fact that lower court judges now have the option to dispose of a case based on qualified immunity without taking the time and money necessary to address the merits.[2] The flexibility afforded by *Pearson*, however, undoubtedly will retard the meaningful development of the *T.L.O.* standard by the lower courts that could have occurred were *Saucier* still in effect. *See id.* at 819 (suggesting that a lower court should not decide

---

[2] In fact, *Amici* believe it appropriate for this Court to identify specific types of cases, such as student search cases, where the circumstantial nature of the cases generally lends itself to the preferred disposal by qualified immunity without deciding the merits.

a case on its merits if qualified immunity is available and if it is a case "in which the constitutional question is so fact-bound that the decision provides little guidance for future cases"). The fact that the lower courts can easily dispose of student search cases on the basis of qualified immunity where each case is circumstantial is another reason this case provides the Court the perfect opportunity to further develop the *T.L.O.* standard.

B. The Ninth Circuit's decision on the merits should be reversed for misapplying the *T.L.O.* standard.

Petitioners' brief addresses many of the reasons why the Ninth Circuit improperly applied *T.L.O.* to the circumstances of this case, but *Amici* emphasize several points that are particularly troubling for educators and school boards generally. Although *Amici* focus much of their concern on the reasonable-in-scope prong of *T.L.O.*, a few issues regarding the justified-at-inception prong warrant attention.

1. The Court should clarify the justified-at-inception prong and, in doing so, correct the errors made by the Ninth Circuit.

The most disconcerting part of the Ninth Circuit's analysis of the justified-at-inception prong is its creation of a "sliding scale" requirement as to suspicion. The Ninth Circuit suggests that, as the intrusiveness of a search increases, educators will need a higher level of suspicion to conduct the

search. This is in direct conflict with *T.L.O.*'s holding that educators need only reasonable suspicion—nothing more—to conduct a student search. *See T.L.O.*, 469 U.S. at 341 (holding that educators need not strictly adhere "to the requirement that searches be based on probable cause"); *id.* at 341-42 (holding that "a search of a student by a teacher or other school official will be justified at its inception when there are *reasonable grounds* for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.") (emphasis added). To the extent that the Ninth Circuit now requires a level of suspicion higher than reasonable suspicion for some student searches to be justified at their inception, this Court should reaffirm the reasonable suspicion standard enunciated in *T.L.O.* and negate any suggestion that a sliding scale is to be used in the justified-at-inception inquiry. To emphasize Petitioners' argument, the issue that needs to be addressed in the first prong is not whether a *strip* search is justified at its inception, but whether a search is justified at its inception.

This case provides the opportunity for this Court to clear up the confusion because, unlike in *T.L.O.*, the educator in this case did not conduct two separate searches. *See T.L.O.*, 469 U.S. at 343-344 ("this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marihuana."). In *T.L.O.*, two separate justified-at-inception inquiries were necessary because there were two separate searches looking for evidence of two different types of misconduct. *Id.* at 343-48. Here, the assistant principal was only

looking for evidence relating to the possession and distribution of prescription drugs. In cases such as this involving only one suspected type of misconduct, *Amici* submit that only one justified-at-inception inquiry is required. If an educator has reasonable suspicion that a student is involved in misconduct, then as long as she is looking for evidence of the original misconduct, she should not have to reconsider whether the degree of suspicion justifies each level of privacy intrusion. The proper analysis for determining the reasonableness of a progressive search under *T.L.O.* is the reasonable-in-scope prong.

By adopting a standard that increases the level of suspicion required of educators to perform more invasive searches, the Ninth Circuit has blurred the line between the justified-at-inception and the reasonable-in-scope prongs. These two prongs, as *T.L.O.* held, are separate and distinct. If an educator has reasonable suspicion to search a student, she is justified at the inception of the search. If there is no reasonable suspicion, the search should not occur. However, once the educator has reasonable suspicion, she need not reassess the level of suspicion when deciding whether the scope of the search is reasonable. As the Court held in *T.L.O.*, a search justified at its inception is reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342. The level of suspicion is completely irrelevant to whether a search satisfies the reasonable-in-scope prong. As discussed below (see *infra* at I.B.2.), provided the search is designed to find the objects

sought and is not excessively intrusive based on the factors of age, sex, and the nature of the infraction, the search should be deemed reasonable in scope, with no reversion to the justified-at-inception prong and no repeat inquiry into the level of suspicion. Any other analysis is contrary to *T.L.O.*

Consider the confusion that the Ninth Circuit's sliding scale would have on other student searches. For example, what would be the proper justified-at-inception standard for a search of a female student where the objective of the search is to turn up evidence that she is selling ecstasy pills to other students? The student has a car, locker, desk, book bag, athletic bag, and a purse. Within the purse are numerous open and zippered pockets. Within the zippered pockets are wallets and smaller zippered bags. Within the book bag is a written journal, digital music player, cell phone, and digital camera. Within the athletic bag is a toiletries bag. The student herself is wearing three layers of clothing, a hat, socks, and shoes. Imagine how complicated it would be for an educator to follow the Ninth Circuit's progressive search analysis for each level of intrusion by considering each item examined to constitute a separate search and recalculating not only the reasonable scope of the search relative to its objectives and its intrusiveness in light of the student's age and sex and the nature of the infraction, but also the initial degree of suspicion. That is not and should not be the standard educators must follow.

This Court also may need to address the issue of student informants. How much can educators rely on student informants to determine whether a search is justified at its inception? Should educators

be held to the same standard as law enforcement in making informant assessments? Consistent with *T.L.O.*, *Amici* encourage this Court on this question not to hold educators to the same standard as law enforcement. Incorporating standards piecemeal from law enforcement case law will, no doubt, encourage lower courts to look to law enforcement doctrines to interpret the *T.L.O.* standard. That is exactly what this Court intended to avoid. 469 U.S. at 343 ("the [*T.L.O.*] standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense"). Rather, it would be reasonable to follow the approach of the Eleventh Circuit and determine that student informants are presumptively reliable enough for educators where a "student informant face[s] the possibility of disciplinary repercussions if the information [is] misleading." *See Driscoll*, 82 F.3d at 388.

2. This Court should clarify the reasonable-in-scope prong and, in particular, emphasize judicial deference to educator risk assessments made pursuant to the nature-of-the-infraction factor.

This Court can clarify the constitutional expectation of educators under *T.L.O.'s* reasonable-in-scope prong without inadvertently exposing students to more danger, needlessly complicating the law, or undermining the sensible judicial deference to educators.

First, under the objectives-of-the-search part of the reasonable-in-scope prong it would be reasonable for the Court to emphasize the need for educators, as occurred in this case, first to attempt to search less intrusively for the objective of the search. Although the exigencies of some extreme situations may not always permit the exhaustion of all less intrusive means of searching, educators should attempt to tailor their searches to start with less intrusive methods before escalating, where appropriate, to more intrusive methods.

Similarly, the age and gender factors as to intrusiveness were not explained in *T.L.O.* but could be here. For the gender factor, it would be presumptively unreasonable for an educator of one gender to perform an invasive search of a student of the opposite gender, particular one involving removal of other than outer clothing like coats and hats. As for the age factor, it is reasonable to require educators to restrict themselves to less invasive searches for younger students. With the age factor, there may also be the added consideration of the student's experience with privacy intrusions. *See Acton*, 515 U.S. at 655 (stating that student athletes have reduced expectation of privacy where they experience "suiting up" and communal undress).

Amici's primary concern regarding the Ninth Circuit's application of *T.L.O.* concerns the nature-of-the-infraction factor of intrusiveness. Although the type of student misconduct at issue should be irrelevant to the justified-at-inception inquiry, it is the focus of the nature-of-the-infraction factor. Generally speaking, the higher the potential danger of the alleged student misconduct, the more

deference courts should give educators regarding the scope of the search.

Amici do not suggest that educators are free from judicial oversight. Public schools are governmental entities, public school educators must comply with the Constitution, and a student search can be too intrusive for the Fourth Amendment to tolerate.

Here, however, the Ninth Circuit neglected to accord school officials the flexibility and deference this Court has deemed appropriate to address effectively the serious problem of student drug abuse. Instead, the Ninth Circuit unwisely substituted its own judgment that the threat of several students ingesting prescription strength drugs did not pose the necessary degree of harm to student health and welfare that would justify searching the student's person and clothing. This is in direct conflict with this Court's precedent.

T.L.O itself represents this Court's first recognition of the need to defer to school officials' efforts to combat drug abuse. "Maintaining order in the classroom has never been easy," the Court noted, "but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *T.L.O.*, 469 U.S. at 339. Because of this alarming trend, the Court appropriately acknowledged "that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *Id.* at 340.

The Court continued this deferential approach in analyzing the constitutionality of the student drug

testing policies at issue in *Acton* and *Earls*. In *Acton*, this Court emphasized society's interest in combating student drug use. "That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring drug use by our Nation's school-children is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs." *Acton*, 515 U.S. at 661. The Court explained that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* Discussing further the systemic problem of drug abuse as a rationale for deferring to educators' judgment about how to combat the problem, the Court wrote that "of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.* at 662. In *Earls*, the Court reiterated its view that deference to educators when combating drug abuse is appropriate in deciding the constitutionality of school searches. "The drug abuse problem among our Nation's youth has hardly abated since [*Acton*] was decided in 1995. In fact evidence suggests that it has only grown worse." *Earls*, 536 U.S. at 834. Nor has the concern abated since *Earls* was decided. In some ways, at least, it has grown worse. For example, the most recent data on female juvenile arrests reveals that drug related arrests have increased by 15 percent since 1997. Office of Juvenile Justice and Delinquency Prevention, *Juvenile Arrests 2006*, 3 (November 2008).

The Court most recently reaffirmed the need for deference in *Morse*. While *Morse* did not address a student search, the Court again noted the critical

importance of combating student drug use by stating "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." *Morse*, 127 S. Ct. at 2623. It would be a strange result indeed if the law allows educators to protect students from speech promoting drug use but unduly constrains them from actually attempting to find and confiscate the drugs themselves when there are reasonable grounds to believe drugs are present at school.

By failing to defer to educators when it substituted its own ideas of which drug threats are important and which are not, the Ninth Circuit has created the very atmosphere of turning the "judge's chambers into the principal's office" against which Justice Breyer warned in his concurring opinion in *Morse*:

> Students will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special. Under these circumstances, the more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no

> one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office.

Id. at 2640 (Breyer, J., concurring).

Now more than ever, schools are in the forefront of addressing dangers to our youth, including their growing abuse of prescription drugs. The Office of National Drug Control Policy ("ONDCP") found in 2006 that, "more than 2.1 million teens abused prescription drugs." *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (Jan. 2008) ("ONDCP Report"). ONDCP Report at 2. Indeed, the report states that "more young people ages 12-17 abuse prescription drugs than any illicit drug except marijuana—more than cocaine, heroin, and methamphetamine combined." *Id.* at 1. Even more alarming, 12- to 13-year-olds indicate that prescription drugs are their drug of choice. *Id.* at 2. In a more recent report, the ONDCP stated that "2.5 million people aged 12 or older used prescription drugs non-medically for the first time. This means there are approximately 7,000 new prescription drugs abusers everyday." ONDCP, *The President's National Drug Control Strategy*, 11 (Jan. 2009). Most prescription drugs have "showed steady growth in use outside of their legitimate medical use through most of the 1990s....As a result, they have become a relatively more important part of the nation's drug abuse problem." Monitor The Future, *2008 Survey Results* ("MTF Report"), 4 (Dec. 11, 2008).

The ONDCP also identified teenaged girls as having a heightened risk for prescription drug

abuse. ONDCP, *Females Bucking Traditional Drug Abuse Trends: Teen Girls, Young Women Now Outpace Male Counterparts for Prescription Drug Abuse, Dependence* (Apr. 30, 2007). ONDCP reported "that females are at particular risk for prescription drug abuse, with higher rates of abuse among teen girls, more emergency room visits among young women, and higher rates of treatment admissions for dependence on some prescription drugs among females." *Id.*

Further, and contrary to the Ninth Circuit's dismissal of any imminent danger, the ONDCP Report states that "[t]here has been a dramatic increase in the number of poisonings and even deaths associated with the abuse of prescription and OTC drugs." *Id.* at 2. The National Institute on Drug Abuse ("NIDA") reports that abuse of prescription or OTC drugs can have a number of adverse physical and psychological effects, including impairing motor function, life-threatening respiratory and heart problems, hostility, paranoia, and depression. NIDA, *Prescription and Over-the-Counter Medications*, 2-7 (July 2008); NIDA August 2005 Report at 2-4. Unfortunately, prescription pain killers have been implicated in nearly 40 percent of the 22,400 annual drug overdose deaths most recently recorded. ONDCP, *The President's National Drug Control Strategy*, 12. This number is compared to the 17,000 deaths attributed to homicide in the same year. *Id.*

Because the Ninth Circuit did not view prescription strength versions of OTC drugs as an imminent threat, it discounted the educator's concern in this case. *See Redding* at 1086 ("We reject Safford's effort to lump together these run-of-the-mill anti-inflammatory pills with the evocative term

'prescription drugs,' in a knowing effort to shield an imprudent strip search of a young girl behind a larger war against drugs."). Not only is it unwise to exclude certain prescription drugs from discussion of prescription drug abuse, but even OTC drugs are being abused more and more. ONDCP Report at 3. OTC drug abuse is of particular concern "given the easy access teens have to these products." *Id.*

One major reason why schools are a natural battleground for the war against prescription and OTC drug abuse is the source of these drugs. More than half of surveyed high school seniors reported their source of prescription drugs "was getting them free from a friend or relative, followed closely by being sold the drugs by a friend or relative....Only about a fifth to a quarter of users of these drugs said that they had bought them from a dealer or stranger." MTF Report, 7, Table 14. "Clearly the informal networks of relatives and friends play a major role in the distribution of these prescription drugs to young users." *Id.* at 7 (internal citation omitted).

Responsible school administrators are well aware of the national trends in student drug abuse and are in a unique position to understand the substance abuse patterns in their own schools and communities, to take these problems seriously, and to use appropriate measures to respond on an educational as well as disciplinary level. But the message the Ninth Circuit's ruling sends is that prescription and OTC drug abuse is not significant enough a problem to warrant immediate intervention by school personnel who have reason to believe that students are planning to ingest drugs neither prescribed by a health care professional nor

provided by their parents. While public health authorities are calling loudly for increased awareness of this issue, the Ninth Circuit dismissed the concern as trifling, if not pretextual. The Ninth Circuit's refusal to accord appropriate deference to school officials makes the difficult job of protecting student health and welfare even harder.

This Court should provide more detailed guidance regarding the nature-of-the-infraction factor under the reasonable-in-scope prong. In doing so, it is prudent to follow precedent and consider recent studies by giving educators relatively more deference when the student misconduct at issue involves drugs.

Amici offer some suggestions for this Court as it further defines and interprets the nature-of-the-infraction factor. First and most important, this Court should clarify that the more a suspected student's conduct poses a potential safety risk on campus or at a school sponsored event, the more deference should be given to educators in making decisions about the appropriate scope of a search. Deference need not be abject, but this case demonstrates the problems that arise when a court strays too far from the deferential approach. That said, where the suspected student misconduct poses no potential safety concern, the Court may wish to indicate that a highly invasive search is presumptively unreasonable.

In addition, there should be no doubt that the unapproved use or distribution at school of drugs—whether illicit, prescription, or OTC—falls into the category of misconduct involving potential harm. The determination of whether a student's conduct poses a safety hazard should not incorporate the

benefit of hindsight. Nor should an educator be forced to research the harmful effects of certain substances before making a decision to conduct a search. While educators are especially well attuned to trends like drug abuse, they are neither pharmacists nor law enforcement officials and should not be expected to know precisely how certain drugs affect students, either alone or in combination with other substances.

The Court also may choose to include an analysis of the relationship between the nature-of-the-infraction factor and both the systemic and the local student safety problems. For example, the concerns over prescription and OTC drug usage have been experienced nationwide,[3] but the local problems

---

[3] In addition to the information from the studies discussed *supra*, a cross section of recent publications provide evidence that prescription and OTC drug abuse among America's youth is neither isolated nor regionalized. *See, e.g.*, ConnectMidMichigan.com, *Midland cracks down on teen drug use* (Feb. 25, 2009) (Central Michigan); Des Moines Register, *Prescription drugs cited in south-side teen death* (Feb. 12, 2009) (Iowa); Colorado Springs Gazette, *Heroin investigation targets high school* (Dec. 16, 2008) (Colorado; major drug ring busted in affluent high school where prescriptions drugs were sold); Syracuse Post-Standard, *Teens' Abuse of Pills Worsens* (Nov. 6, 2008) (New York); Rocky Mountain News, *'Pharming' a growing fear—Some school districts are seeing a 'scary' increase in the dangerous trend of abusing prescription and over-the-counter pills* (Mar. 5, 2008) (Colorado); Times Leader, *Lyon students press for school drug testing* (Jan. 21, 2008) (Kentucky; noting "that five middle school students had overdosed on prescription drugs at school in the past two years"); Arkansas Leader, *Overdoses concern parent* (Dec. 17, 2007) (Arkansas); WSAZ NewsChannel 3, *High School Student Overdoses on Xanax* (Sep. 28, 2007) (Southern Ohio); Ventura County Star, *Drug mix may have killed teen in Ventura* (Apr. 13, 2007) (Southern California); Omaha World-Herald, *Prescription-drug*

may present unique dangers or create heightened awareness among local educators.

As a final note on the nature-of-the-infraction factor, it is important that the Court not misperceive this as a case where school boards and educators are seeking the Court's approval to develop policies and practices that encourage strip searches of students. Educators know that each situation is circumstantial, but without further clarity as to the *T.L.O.* intrusiveness factors, they are left in a position of making important on-the-spot judgments without knowing whether they will lose a lawsuit for searching for drugs or weapons. As this Court stated in *T.L.O.*, reason and common sense should dictate educator decisions and methods of searching their

---

abuse is a growing problem among students (Mar. 15, 2007) (Nebraska); Daily Herald, *Kids taking drugs early and what they're using to get high may surprise you* (May 29, 2006) (Illinois); Orange County Register, *Campus overdose puts 3 in hospital—Fountain Valley High students are hospitalized* (Dec. 15, 2005) (Southern California); Dallas Morning News, *Destroyed by doping: Taylor's story, In the end, drugs' wrath proved stronger than he was* (June 5, 2005) (Texas); Sacramento Union, *Prescription Drug Overdose Sparks Fear* (May 18, 2005) (Northern California); Star Tribute, *No charges filed in teen's overdose on pain drug* (May 17, 2005) (Minnesota); Pittsburgh Post-Gazette, *Kids' abuse of over-the-counter cold medicine on the rise* (Mar. 21, 2005) (Pennsylvania); Washington Post, *Household Medicine Abused by The Young* (Oct. 8, 2004) (DC area); Arizona Republic, *Gilbert unites to fight teen drug use* (May 8, 2004) (Arizona); This Week, *Abuse of over-the-counter drugs posing danger for young users* (Jan. 22, 2004) (Central Ohio); USA Today, *Youths risk death in latest drug abuse trend* (Dec. 29, 2003) (Southern Florida); Detroit News, *Teen abuse of cold drug on the rise* (Mar. 14, 2002) (Southern Michigan); Sarasota Herald Tribune, *Teen's body found in ditch* (Dec. 24, 2000) (Central Florida; 13-year-old died after overdose of OTC drug).

students. *Amici* ask this Court to expound helpfully on the *T.L.O.* test.

II. UPHOLDING THE NINTH CIRCUIT'S DECISION REGARDING QUALIFIED IMMUNITY WILL HAVE A CHILLING EFFECT ON EDUCATORS AND IMPLICATIONS FOR STUDENT SAFETY.

Amici recognize that student strip searches are rightly controversial and that reasonable minds will differ about what kinds of exigencies could warrant such a drastic, and rare, step in the school environment. Educators who must make quick decisions where student safety is concerned, however, should not be subject to personal liability because of the sensitivity and controversy of a measure. Educators like the assistant principal here should not be denied qualified immunity where their action was neither plainly incompetent nor in knowing violation of clearly established law. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (government officials have qualified immunity unless their actions where plainly incompetent or in knowing violation of clearly established law).

The legal uncertainties surrounding student searches described above should preclude a finding of clearly established law necessary to deny a governmental official the protection of qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Both this Court and the Ninth Circuit have held that, to overcome qualified immunity, the "specific contours of the law" must be well developed or "sufficiently clear that a reasonable official would understand that what he is doing violates [a

constitutional] right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citations omitted); *Rudebuch v. Hughes*, 313 F.3d 506, 518 (9th Cir. 2002). This is a standard that "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 534 U.S. 194, 198 (2004) (quoting *Saucier*, 533 U.S. at 201).

As noted *supra*, applying *T.L.O.* is no easy matter for an educator in an ongoing investigation of possible student misconduct. *See Beard v. Whitemore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) (*T.L.O.* is not the kind of clear law necessary to clearly establish unlawfulness of student strip searches); *Ellington*, 936 F.2d at 886 (the *T.L.O.* test "has left courts later confronted with the issue either reluctant or unable to define what type of conduct would be subject to [§ 1983 liability]"). Prior to the decision in this case, the courts had not provided clear guidance to educators in the Ninth Circuit about the law on student strip searches. *T.L.O.*, the only individualized suspicion student search case decided by this Court, did not involve removal of student clothing, and while it established relevant factors to assess the constitutionality of school searches, it necessarily left to future courts the application of these factors to the unique circumstances of each case. There have been few federal court decisions applying *T.L.O.* to strip searches, and their results have been conflicting. Absent a declaration from this Court, clear law in the school administrator's own jurisdiction, or consistency among the circuits on strip searches, there can be no real argument that the specific contours of the law on strip searches of students were sufficiently clear so that the assistant principal

here reasonably should have known that his action violated the student's Fourth Amendment rights.

Based on *T.L.O.* and its progeny, it is clear to educators that, before they conduct a search, they must have reasonable suspicion that a search will likely turn up evidence that the student violated the law or a school rule. It is assuredly not clear, however, that it would be unconstitutional to proceed with a search at its inception where the search is based on information obtained from student informants in the context of both school-wide and student-specific drug and alcohol abuse. *See, e.g.*, *T.L.O.*, 469 U.S. at 337-48 (search justified at inception based on informants indicating student was smoking in the lavatory; second search justified at inception based on finding evidence of violation during first search); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823-28 (11th Cir. 1997) (search justified at inception where second grade student advised educator that someone stole his $7); *Driscoll*, 82 F.3d at 388 (search justified at inception where student informant advised educators that another student was going to sell drugs on campus); *Cornfield*, 991 F.2d at 1321-28 (search justified at inception where student had history of drug related offences and educators observed what appeared to be a male student "crotching" drugs); *Rudolph ex rel. Williams v. Lowndes County Bd. of Educ.*, 242 F. Supp. 2d 1107, 1115-17 (M.D. Ala. 2003) (search not clearly unjustified at inception when, after drug sniffing dog alerted in library, drugs were found under table where student was sitting).

Further, while *T.L.O.* and its progeny also make clear to educators that a search must be reasonable in scope to find the objectives of the

search in light of the age and gender of the student and the nature of the infraction, under current case law, at least, it was not self-evidently unconstitutional to perform a strip search of a junior high female student to find prescription pills where: (a) prior to the search, educators searched the student's personal belongings; (b) the search was performed by two educators of the same gender as the student; (c) the educators never touched the student; and (d) the student was not required to remove her underwear. *See, e.g.*, *T.L.O.*, 469 U.S. at 337-48 (first search reasonable in scope because search of purse reasonable to find evidence of smoking; second search reasonable in scope because further search of purse reasonable to find evidence of possession and distribution of marijuana); *Jenkins*, 115 F.3d at 823-28 (strip search of second graders looking for stolen $7 not clearly unreasonable in scope where students were brought to the restroom to disrobe); *Cornfield*, 991 F.2d at 1321-28 (strip search reasonable in scope where educators suspected student to be "crotching" drugs, educators of the same gender searched by asking the student to remove his clothing and put on gym uniform, and no body cavity searches were performed); *Ellington*, 936 F.2d at 886-89 (strip search not clearly unreasonable in scope where educators trying to locate glass vial of drugs and educators first searched the student's purse and locker); *Rudolph*, 242 F. Supp. 2d at 1115-17 (nude search not clearly unreasonable in scope where educators looking for drugs); *Singleton*, 894 F. Supp at 390-91 (strip search reasonable in scope where search occurred in office with two educators of the same gender and student was not required to remove underwear).

Amici find it difficult to comprehend how the Ninth Circuit could subject an educator to personal liability for ordering a student search where even the judges reviewing the case could not agree whether the search was legal. Here the federal district court found the search to be constitutional, and a Ninth Circuit panel affirmed. Only on *en banc* review did the Ninth Circuit find the search unconstitutional, and then only by eight of eleven judges. This Court has already opined that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603 (1999).

Morse provides further instruction on the implications of judicial disagreement for qualified immunity determinations. Not a single justice in *Morse* expressed any doubt that the educator at issue was entitled to qualified immunity. *Morse*, 127 S. Ct. at 2638-43 (Breyer, J., concurring in part and dissenting in part) (arguing that the "Court need not and should not decide this rather difficult *First Amendment* issue on the merits" but "simply hold that qualified immunity bars the student's claim..."); *id.* at 2643 (Stevens, J., dissenting) ("I agree with the Court that the principal should not be held liable...."). Also, during oral argument, Justice Souter—who would have found the educator's actions in that case unconstitutional—suggested that the spirited oral argument about the merits of the case was strong evidence that the educator at issue was entitled to qualified immunity.[4] Chief

---

[4] Transcr. Of Oral Argument at 49-50, *Morse*, 127 S. Ct. 2618 ("JUSTICE SOUTER: We've been debating this in this courtroom for going over an hour, and it seems to me however

Justice Roberts and Justice Kennedy were even more direct in their opinion that the educator in *Morse* was certainly entitled to qualified immunity.[5]

Denying immunity to educators despite the lack of clarity over student searches will harm the more than 14,000 school districts, the 225,000 school administrators across the nation, and, ultimately, the millions of children they serve. If the Ninth Circuit's qualified immunity decision stands, it will create a chilling effect on educators who actively combat serious risks to student safety.

CONCLUSION

For these reasons, *Amici* urge the Court to: (a) decide this case on its merits to provide needed clarity; (b) rectify the errors made by the Ninth Circuit that seriously undermine school districts' efforts to address student drug abuse in an effective manner; and (c) at the very least, determine that the school official in this case should not be placed at personal legal risk for taking actions to safeguard the health and welfare of the students entrusted to his care.

---

you come out, there is reasonable debate. Should the teacher have known, even in the[] calm deliberative atmosphere of the school later, what the correct answer is?").

[5] *Id.* at 29-30.

Respectfully submitted,

Francisco M. Negrón, Jr.
Thomas E.M. Hutton
National Sch. Bds. Assoc.
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

David R. Day
Counsel of Record
Séamus P. Boyce
Church Church
Hittle & Antrim
12514 Reynolds Dr.
Fishers, IN 46038
317-773-2190

March 4, 2009

AMICUS CURIAE BRIEF

No. 08-479

In The Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, *et al.*,
Petitioners,

v.

APRIL REDDING,
LEGAL GUARDIAN OF MINOR CHILD,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE RUTHERFORD INSTITUTE, GOLDWATER INSTITUTE AND CATO INSTITUTE IN SUPPORT OF RESPONDENT

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22911
(434) 978-3888

Timothy Lynch
Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 218-4600

*Clint Bolick
Nicholas C. Dranias
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL
LITIGATION
500 E. Coronado Road
Phoenix, AZ 85004
(602) 462-5000

CANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Interest of Amici 1

Summary of the Argument 3

I. Strip Searches, Particularly of Students, Are Subject to a Higher Level of Scrutiny Than Other Kinds of Searches 4

A. This Court Has Consistenly Held That More Intrusive Searches Require More Compelling Government Justifications 9

B. The Court Below Correctly Found the Factual Predicate for the Strip Search–Especially Marissa's Accusation–not to Be Reasonable 11

C. The Court Below Also Correctly Found the Strip Search Not to Be Reasonably Related in Scope to the School Officials' Investigation 15

D. The Court Below Also Correctly Found That the Strip Search's Level of Intrusion Was Disproportionate to the Nature of the Violated School Rule 18

II. This Court Should Reach the Substantive Fourth Amendment Issue at the Heart of This Case 21

Conclusion 23

TABLE OF AUTHORITIES

Cases

Bell v. Wolfish, 441 U.S. 520 (1979).....7, 9

C.B. by and through Breeding v. Driscoll, 82 F.3d 383 (11th Cir. 1996).....13

Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1991).....5

Camara v. Municipal Court, 387 U.S. 523 (1967)..6, 7

Cornfield by Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) 8, 11, 17

Doe v. Renfrow, 631 F.2d 91 (7th Cir.), *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981) 5

Edwards v. Aguillard, 482 U.S. 578 (1987).....19

Illinois v. Gates, 462 U.S. 213 (1983).....16

Leatherman v. Tarrant County Narcotics, Intelligence & Coordination Unit, 507 U.S. 163 (1993) 22

Lilly v. Virginia, 527 U.S. 116 (1999).....12

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983).....5

Maryland v. Garrison, 480 U.S. 79 (1987) 15

New Jersey v. T.L.O., 469 U.S. 325 (1985) .....passim

O'Connor v. Ortega, 480 U.S. 709 (1987).....6

Pearson v. Callahan, 129 S.Ct. 808 (2009).....21, 22

Phaneuf v.Fraikin, 448 F.3d 591 (2d Cir. 2006) 5, 8, 11

Pierce v. Society of Sisters, 268 U.S. 510 (1925).....19

Prince v. Massachusetts, 321 U.S. 158 (1944).....20

Redding v. Safford Unif. Sch. Dist. # 1, 531 F.3d 1071 (9th Cir. 2008).....8, 11, 12

Saucier v. Katz, 533 U.S. 194 (2001).....21, 22

Terry v. Ohio, 392 U.S. 1 (1968).....passim

Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980).....5

United States v. Cortez, 449 U.S. 411 (1981).....13

United States v. Di Re, 332 U.S. 581 (1948).....16

United States v. Mangana-Olvera, 917 F.2d 401 (9th Cir. 1990).....12

United States v. Ross, 456 U.S. 798 (1982).....15

Warden v. Hayden, 387 U.S. 294 (1967).....13

Wisconsin v. Yoder, 406 U.S. 205 (1972).....19

Wyoming v. Houghton, 526 U.S. 295 (1999).....16, 17

Ybarra v. Illinois, 444 U.S. 85 (1979).....16

Statutes

42 U.S.C. § 1983.....21

Rules

Sup. Ct. R. 37.6.....1

Constitutional Provisions

U.S. Const., Amend. IV.....passim

INTEREST OF *AMICI*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because a decision adverse to the respondent will increase the threat to the fundamental rights of children in our public schools and will place them at risk of unwarranted invasions of the most intimate aspects of their privacy.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*,

---

[1] Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* brief.

and files *amicus* briefs with the courts. This case is of central concern to Cato because it involves an important application of the Fourth Amendment's protections against unjustified, arbitrary, and overly intrusive searches.

The Goldwater Institute's Scharf-Norton Center for Constitutional Litigation is a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute advances public policies that further the principles of limited government, economic freedom and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the Bill of Rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no single contributor has provided more than five percent of its annual revenue on an ongoing basis.

Strip searches are universally recognized as severe intrusions of personal privacy that ought to be strictly limited. For the reasons set forth in this brief, *amici* believe that the Ninth Circuit's *en banc* decision should be affirmed. School administrators should not be given a virtual *carte blanche* to conduct strip searches of students.

SUMMARY OF THE ARGUMENT

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), this Court accommodated the interests of public school educators and administrators in maintaining order and discipline in public schools by easing the restrictions on searches normally imposed upon state actors by the Fourth Amendment. In ruling that in-school searches of students in the school setting need not be supported by probable cause, however, the *T.L.O.* decision made clear that the "reasonableness" of a school search largely depends on whether the search is "excessively intrusive in light of the age and sex of the student and nature of the infraction." *Id.* at 342. This Court clearly signaled that the severity of the privacy invasion must be considered when deciding whether school officials have violated a student's Fourth Amendment rights.

In light of *T.L.O.*'s direction to consider the intrusiveness of a search, the *en banc* Ninth Circuit correctly understood here that a strip search of a student will be reasonable only when school officials have clear evidence to justify it. Strip searches are unquestionably privacy invasions of a different order and higher degree than "ordinary" searches and should be undertaken rarely. Only when school officials have highly credible evidence showing (1) the student is in possession of objects posing a significant danger to the school and (2) that the student has secreted the objects in a place only a strip search will uncover is such a search reasonable.

Questions involving Fourth Amendment reasonableness necessarily must be decided on a case-by-case basis, and the Ninth Circuit properly determined that the strip search of Savana Redding violated the girl's Fourth Amendment rights. Most importantly, the strip search was initiated on the basis of questionable information. Indeed, there was a complete absence of any information indicating that contraband would be found underneath Savana's clothing.

This Court should affirm the Ninth Circuit and, in so doing, provide guidance to school officials that will protect the security of students from severe intrusions into their personal privacy. This Court should establish that strip searches of children may be undertaken only after careful reflection and only when compelling evidence suggests that a search is necessary to preserve school safety and health.

I. STRIP SEARCHES, PARTICULARLY OF STUDENTS, ARE SUBJECT TO A HIGHER LEVEL OF SCRUTINY THAN OTHER KINDS OF SEARCHES

The serious nature of the intrusion effected by a strip search cannot be overstated. Strip searches are the most severe invasions of privacy that the government can legally commit. One court has described "strip searches involving the visual inspection of the anal and genital areas as 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive,

signifying degradation and submission[.]'" *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (quoting *Tinetti v. Wittke*, 479 F. Supp. 486, 491 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980)).

Strip searches of students specifically have been universally recognized as "highly intrusive." *Phaneuf v.Fraikin*, 448 F.3d 591, 596 n. 4 (2d Cir. 2006). "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old is an invasion of constitutional rights of some magnitude. More than that, it is a violation of any known principle of human dignity." *Calabretta v. Floyd*, 189 F.3d 808, 819 (9th Cir. 1991) (quoting *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir.), *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981)).

In the *T.L.O.* case, Justice Stevens and two other Justices made clear that strip searches are of a different order than other searches, and courts must take this difference into account when evaluating the reasonableness of these searches. "One thing is clear under any standard—the shocking strip searches that are described in some cases have no place in the schoolhouse. . . . To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm." *T.L.O.*, 469 U.S. at 381, n. 25 (Stevens, J., concurring in part and dissenting in part).

Because of the assault on human dignity caused by a strip search and the danger of severe trauma to children, school officials must have particularly strong and targeted evidence to support the decision to require a student to disrobe and expose his or her private areas. *T.L.O.* recognized as much in holding that "[t]he determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search *against the invasion which the search entails.*'" *Id.* at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)) (emphasis added).

Indeed, this Court has repeatedly held that the determination of reasonableness under the Fourth Amendment is informed by the nature of the intrusion. *Terry v. Ohio*, 392 U.S. 1 (1968), held that investigatory stops of individuals involving "pat-downs" were allowable where police have "reasonable suspicion," a standard short of probable cause. This Court arrived at its holding only after considering "the nature and quality of the intrusion on individual rights," *Terry*, 392 U.S. at 24, and determining that pat-downs are a "limited search for weapons" and do not involve an extensive exploration of the person. *Id.* at 25.

The Court also stressed the limited nature of the intrusion into privacy in *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987). *O'Connor* established that searches of government employee offices for evidence of work-related misconduct need only be supported by reasonable suspicion. Workplace searches entail

an invasion of privacy interests that "are far less than those found at home or in some other contexts. . . . As with the building inspections in *Camara*, the employer intrusions at issue here 'involve a relatively limited invasion' of employee privacy." *Id.*, quoting *Camara*, 387 U.S. at 587.

This balancing must be made on a case-by-case basis by government actors:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. *In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.* Courts must consider *the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it*, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559 (1979) (emphasis added). As recognized in *Terry*, the "sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, *and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.*" 392 U.S. at 19, n. 15 (emphasis added).

Consistent with these principles and the analysis in *T.L.O.*, the Ninth Circuit's *en banc* decision held, in accord with other circuit courts, that "'the reasonableness of the suspicion is informed by the very intrusive nature of a strip search, requiring for its justification a high level of suspicion.'" *Redding v. Safford Unif. Sch. Dist. # 1*, 531 F.3d 1071, 1081 (9th Cir. 2008) (quoting *Phaneuf*, 448 F.3d at 596). *Accord Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993). The strip search of Savana failed that test because (1) the evidence implicating Savana with possession of ibuprofen, and in particular the accusation of another student that Savana was the source of the pills, was not sufficiently probative or reliable to support a strip search, *Redding*, 531 F.3d at 1082-84, (2) school officials had no evidence indicating that Savana was hiding any pills beneath her clothes, *id.* at 1084-85, and (3) the nature of the infraction was not such as to justify a strip search. *Id.* at 1088-87.

The Petitioners assert that the ruling below is inconsistent with *T.L.O.* and allows school officials insufficient latitude in determining what steps to take to preserve the order and safety of schools. But where strip searches of children are at issue, *T.L.O.* mandates a balancing of public and private interests such that school officials exercise more restraint and judges greater scrutiny. It is only proper that school officials be required to exercise more caution in making the decision to conduct a strip search, given the extreme invasion and grave risk of trauma

inherent to such searches. The ruling below is true to the interest-balancing required by *T.L.O.* by imposing heightened standards in judging whether school officials acted reasonably in strip searching a student.

A. This Court Has Consistently Held That More Intrusive Searches Require More Compelling Government Justifications

This Court's Fourth Amendment jurisprudence, capped by *T.L.O.*, militates an enhanced level of suspicion for strip searches. As described above, *T.L.O.*'s reasonableness standard ultimately depends upon a balancing of interests that takes into account the invasion which the search entails. *T.L.O.*, 469 U.S. at 337. A search must be "reasonably related in scope" to the circumstances justifying the interference. As a general matter, Fourth Amendment reasonableness depends upon the scope of the intrusion and the manner in which it is conducted. *Bell*, 441 U.S. at 559.

The Petitioners' contention that the enhanced standard applied by the Ninth Circuit (and other circuit courts that have reviewed student strip searches) conflicts with *T.L.O.* is based on the assumption that *T.L.O.* establishes "reasonable suspicion" as the standard for student searches. Pet. Br. 30, 32. But nothing in *T.L.O.* indicates that it adopted the "reasonable suspicion" standard for all student searches. Instead, this Court held that reconciliation of student privacy interests with the

needs of teachers and school administrators to maintain order "does not require strict adherence to the requirement that searches be based on probable cause[.]" *T.L.O.*, 469 U.S. at 341. This Court did not rule out that probable cause, or some level of suspicion approaching probable cause, may be appropriate. Indeed, it held that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *Id.*

T.L.O.'s reliance on the decision in *Terry v. Ohio*, *supra*, should not be taken as a signal that the reasonableness of each and every student search, and strip searches in particular, is to be judged under *Terry*'s "reasonable suspicion" standard. Because *Terry* authorized only the limited (albeit significant) invasion of a stop and "frisk," a single standard of "reasonable suspicion" could be established as justifying the invasion. However, as the instant case bears out, not all student searches involve the same degree of intrusion into privacy. It would be a departure from this Court's established precedent--which measures Fourth Amendment reasonableness by looking to the nature of the intrusion--to conclude that strip searches of students are justified by the same quantum of evidence that justifies an examination of those student's lockers or backpacks.

The Petitioners seek to divorce the nature and degree of the intrusion upon a student from the inquiry into whether a search is justified. They criticize the *en banc* opinion for breaking the search

of Savana into two components—the search of her belongings and the search requiring that she disrobe and expose her private areas to school personnel.

But this criticism fails to recognize that a strip search is an intrusion into privacy that is different of a wholly different magnitude from a search of a student's effects, or even of the student's outer clothing. Under established Fourth Amendment principles measuring reasonableness on the basis of the invasion involved, student strip searches must be evaluated under a higher standard of scrutiny than other student searches. Otherwise, school officials have essentially unfettered discretion to conduct strip searches whenever they suspect a violation of school rules regarding the possession of contraband.

B. The Court Below Correctly Found the Factual Predicate for the Strip Search—Especially Marissa's Accusation—Not to Be Reasonable

The *en banc* Ninth Circuit closely examined the information that was the basis for searching Savana. Citing other circuit courts that have considered strip searches, its decision noted that the nature and reliability of evidence is a crucial factor in determining whether a strip search is reasonable. *Redding*, 531 F.3d at 1081 (citing *Cornfield*, 991 F.2d at 1321, and *Phaneuf*, 448 F.3d at 596). Again, this approach is wholly consistent with the principle that the scope of the particular intrusion is the central

element in the analysis of reasonableness. *Terry*, 392 U.S. at 19, n. 15.

The lower court recognized that the primary basis for conducting the strip search, Marissa's accusation, was self-serving and of doubtful reliability. *Redding*, 531 F.3d at 1082-83. It relied on case law holding that informant statements inculpating others made after the informant has been apprehended or arrested are not considered reliable. *See, e.g. Lilly v. Virginia*, 527 U.S. 116, 133 (1999) ("our cases consistently have viewed an accomplice's statements that shift or spread the blame to" another are insufficiently reliable to be admitted in evidence, even if the statements are part of an otherwise inculpatory confession). This Court has recognized that such statements are clouded by the motive to mitigate culpability by spreading or shifting blame to others. *Lee v. Illinois*, 476 U.S. 530, 544 (1986). *See also United States v. Mangana-Olvera*, 917 F.2d 401, 408 (9th Cir. 1990) (courts have closely scrutinized statements made while a declarant is in custody and offered against an accused because such statements may be made with the purpose of placating authorities or diverting their attention).

The Petitioners take issue with the conclusion that Marissa's accusation was of limited reliability, arguing that this finding was based upon precedent arising from irrelevant criminal cases. Pet. Br. 30-31. But even *T.L.O.* looked to criminal law precedent in determining whether information possessed by the school officials supported the reasonableness of their

search. *T.L.O.*, 469 U.S. at 345-46 (citing *Warden v. Hayden*, 387 U.S. 294, 306-07 (1967), and *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

Moreover, cases involving informant reliability in the criminal context are relevant not because a criminal matter is involved but because they recognize "'common-sense conclusion[s] about human behavior' upon which 'practical people'—including government officials—are entitled to rely." *T.L.O.*, 469 U.S. at 346. The idea that a person, especially a young person, will try to minimize her guilt and shift blame to others when caught red-handed is simply a recognition of human nature borne out by experience. It does not cease to have relevance simply because the person is in a school and surrounded by school officials, as opposed to law enforcement agents. The decision below thus correctly held that school officials should have treated Marissa's accusation with skepticism.[2]

Marissa's statements clearly fall into the category of statements deemed inherently unreliable as a matter of experience and common sense. They named Savana as the source of the pills, and indicate an attempt not merely to spread blame but to

---

[2]The Petitioners, citing *C.B. by and through Breeding v. Driscoll*, 82 F.3d 383, 288 (11th Cir. 1996), assert that Marissa's accusation should not be deemed unreliable because she knew she faced discipline if her accusation proved to be false. But Marissa did not tell school officials that Savana had pills; she stated that she obtained the pills from Savana. Thus, there was nothing about Marissa's accusation that was provably false such that she could fear additional discipline for lying.

implicate and divert attention to Savana as the more culpable "dealer." At the time, Marissa had been found possessing one blue pill, several white pills, and a razor blade, and so was clearly in trouble. Given Marissa's incentive to deflect focus from herself, school officials were not reasonable in determining that her statements were grounds for conducting strip-searching Savana.

Marissa's accusation needed additional significant indicia of reliability to justify the severe intrusion upon Savana's privacy. Here again, the record fails to reveal any such facts, other than the existence of some friendship between Savana and Marissa. However, friendships, especially among teenage girls, can be particularly volatile and involve dynamics that prevent one from presuming that a "friend" will not seek to shift blame to another friend. As pointed out in the Respondent's Brief, there in fact had been a falling out between Savana and Marissa before Marissa was caught with the pills. Resp. Br. 33. The Petitioners point to the fact that Savana loaned Marissa the black planner in which knives and other contraband were found. Pet. Br. 10, 28. But the record is devoid of evidence showing that Savana loaned the planner to Marissa knowing Marissa would use it to hide pills or other drugs. Resp. Br. 33-34 (citing J.A. 14a). It also is significant that Jordan, a person with inside information who was apparently trying to assist school administrators, did not implicate Savana in the possession of pills. Pet. Br. 6.

In sum, the inherent dubiousness of Marissa's blame-shifting statements was not offset by any significant indicia of reliability. Absent some corroboration of Marissa's self-serving accusation, it was not reasonable for school officials to conduct a strip search.

C. The Court Below Also Correctly Found the Strip Search Not to be Reasonably Related in Scope to the School Officials' Investigation

T.L.O.'s two-fold inquiry also requires an examination of whether the search conducted by school officials was "reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S. at 341

The decision to strip-search of Savana cannot satisfy this stricter reasonableness standard--or even a less rigorous reasonable suspicion standard--because even if school officials had a reliable basis for believing Savana possessed drugs, they did not have reason to believe that she had hidden the drugs in her underclothing. Suspicion justifying a search must exist not only as to the individual or premises, but also as to the place where the search is to be conducted. "Thus, the scope of a lawful search is 'defined by the object of the search *and the places in which there is probable cause to believe that it may be found.*'" *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)) (emphasis added). The "totality of

circumstances" approach to search justification requires government officials to have a basis for concluding that contraband will be found "in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

This concern that searches be focused on the places where suspicion exists is of particular importance when searches of the person are at issue. For example, to find in *Wyoming v. Houghton*, 526 U.S. 295 (1999), that probable cause to believe a vehicle contains contraband authorizes police to conduct a search of the passenger's belongings, this Court first had to distinguish *United States v. Di Re*, 332 U.S. 581 (1948), and *Ybarra v. Illinois*, 444 U.S. 85 (1979), which held that probable cause to search a car or business establishment did not justify a body search of a passenger or person on the premises:

> These cases turned on the unique, significantly heightened protection afforded against searches of one's person. 'Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.' . . . Such traumatic consequences are not to be expected when the police examine an item of personal property found in a car.

Houghton, 526 U.S. at 303 (quoting *Terry*, 392 U.S. at 24-25). Searches of the person, and strip searches in particular, are severe privacy intrusions. The scope of such searches must be supported by some particularized evidence that the items sought will be found in the specific place to be searched.

In this case, the Petitioners did not have sufficient grounds for believing that they would find drugs by strip-searching Savana. There is no indication that school officials had knowledge of a practice among students to hide prohibited items in their undergarments. With respect to this particular incident, the Petitioners had already conducted a strip search of Marissa *and found nothing hidden in her undergarments*; all the pills and other prohibited items were found in Marissa's effects. Further, there was no indication that Savana or Marissa, having become aware that they were suspected of drug possession, had an opportunity to hide any drugs in their undergarments. Savana was taken directly from her class to Defendant Wilson's office and was under observation from that time forward. *Cf. Cornfield*, 991 F.2d at 1322 (strip search of student for drugs was reasonable where officials observed unusual bulge in the student's crotch area).

If, as urged by Petitioners, the *en banc* decision is reversed and the search held to have been reasonable in scope, it will signal to school officials that they have authority to conduct strip searches simply because a student could *possibly* hide the sought item in her undergarments. The implications

for student privacy rights are enormous. Strip searches would be allowed whenever the item sought is small enough to fit inside clothing, regardless of whether there is any basis for believing a student has secreted an item near her body. Student strip searches would become the rule, rather than the exception, particularly in our "zero tolerance" world.

The Fourth Amendment's guarantees to security and privacy are offended by a rule which would place so little restraint on the power of government officials. The heightened reasonableness standard required when examining strip searches demands that school officials in particular act on something more than hypothetical possibility when requiring students to shed their clothes and expose their bodies. Student strip searches should be allowed only when school officials have compelling information indicating a strong likelihood that the strip search will disclose contraband, not whenever officials suspect a student is carrying contraband.

D. The Court Below Also Correctly Found That the Strip Search's Level of Intrusion Was Disproportionate to the Nature of the Violated School Rule

The Petitioners also claim that the *en banc* decision erred by considering the nature of the infraction as part of the "reasonableness" calculus. Yet *T.L.O.* makes the infraction one consideration in determining the validity of a student search. That is a search must not be "excessively intrusive in light of

the age and sex of the student and *the nature of the infraction*." *T.L.O.*, 469 at 342 (emphasis added).

Notwithstanding this holding, the Petitioners point to a footnote in *T.L.O.* that expresses a hesitancy to make the legality of a student search dependent on a judge's evaluation of the importance of a school rule. *Id.* at 342, n. 9. However, this footnote does not indicate that no circumstances exist under which the nature and seriousness of the infraction at issue is relevant to determining a search's reasonableness. Instead, this Court wrote that "the courts should, *as a general matter*, defer to [the] judgment [of school officials] and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not." *Id.* (emphasis added).

Compounding the overall unreasonableness of the search under the applicable standards is the special circumstance of the imposition of the search upon a minor of tender years in a school setting. The Court has recognized that young children are especially impressionable, which limits the type of coercive actions in which school officials permissibly may engage. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). Likewise, the Court has recognized that parents have the primary responsibility and control over their children's education. *Wisconsin v.* Yoder, 406 U.S. 205, 213-14 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). It is a cardinal principle "that the custody, care and nurture of the child reside first in the parents, whose primary

function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

One aspect of this case that is especially shocking is that despite Savana's young age and the extreme coercion and intrusion on the part of school officials, Savana's parents were not notified of the strip search, nor invited to be present. Given that Savana was in a controlled setting at all times, and that as a result the prospect of hiding or disposing of evidence was minimal, it would not be cumbersome to have required the school to contact the girl's parents. An attempt should have been made to notify one of her parents of the situation and a reasonable opportunity allowed for a parent to be present and consulted about the search. To strip-search a young minor outside of the presence of parents invites abuse and, at the same time, the prospect of liability of school officials that the district here tries to avoid. Because this is far from the circumstances in which most criminal searches have been considered, *amici* urge the Court to take this important factor into account.

Strip searches of children in schools are not run-of-the-mill actions. The seriousness of the invasion resulting from a strip search requires that they be undertaken only in the most serious of circumstances. Courts must consider the seriousness of the infraction at issue before ratifying the decision to subject a student to a possibly traumatizing

examination if such examinations are to remain the exception rather than the rule.

II. THIS COURT SHOULD REACH THE SUBSTANTIVE FOURTH AMENDMENT ISSUE AT THE HEART OF THIS CASE

Amici agree with the views expressed in the other briefs filed in this action; the Court ought to rule on the substantive Fourth Amendment issue in this case. Although the Court's recent decision in *Pearson v. Callahan*, 129 S.Ct. 808 (2009), allows a court discretion to dispose of a claim against individual state actors under 42 U.S.C. § 1983 on qualified immunity grounds by determining whether the right at issue was "clearly established," *Pearson* did not rule (or even suggest) that the preferred course is to avoid a decision on whether a constitutional right was violated:

> [W]e continue to recognize that [the two-step procedure of *Saucier v. Katz*, 533 U.S. 194 (2001)] is often beneficial. For one thing, there are cases in which there would be little, if any, conservation of judicial resources to be had by beginning and ending with a discussion of the "clearly established" prong.

Pearson, 129 S.Ct. at 818. In short, *Pearson* stressed that the policy underlying *Saucier*, *i.e.*, promotion of

the development of constitutional precedent, is an important one. *Id.*

Under the circumstances of the instant case, the policy of judicial economy supported by *Pearson* does not urge eschewing the *Saucier* procedure by deciding only whether the constitutional right at issue was clearly established. Claims were asserted against the School District as a governmental entity, and those claims are not barred by qualified immunity. *Leatherman v. Tarrant County Narcotics, Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993). Indeed, because the decision on the reasonableness of the strip search will advance resolution of other claims against the School District, judicial economy counsels in favor of settling the Fourth Amendment issue directly.

Pearson also holds that use of the *Saucier* procedure is warranted and valuable "with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson*, 129 S. Ct. at 818. That is, if qualified immunity is usually available in a particular kind of case, avoidance *Saucier*'s first prong will stifle development of constitutional precedent. That circumstance also applies here because student strip searches are most likely to be the result of school officials' *ad hoc* decisions where only individual capacity suits--subject to a qualified immunity defense--are available to the injured parties.

Of greater importance, however, is the need for a controlling decision offering guidance to school officials regarding strip searches. Given the substantial public and private interests at stake, officials must fully understand the limits on their authority. Anything less undermines student privacy.

CONCLUSION

Throughout their merits brief, Petitioners decry a regrettable consequence of the decision below: educators must now "school themselves" in Fourth Amendment jurisprudence and allows courts to second-guess their judgment. But, given the seriousness of the intrusion effected by strip searches, this consequence is unavoidable.

School officials must realize that they may conduct strip searches only in extremely limited circumstances, and only on the basis of compelling evidence. The alternative implicit in the Petitioners' suggested resolution of this case is an unblinking deference to school officials that places students' privacy and security in grave jeopardy.

For the above reasons, the Ninth Circuit properly found that the strip search of Savana Redding was not reasonable and therefore violated the Fourth Amendment. That decision should be affirmed as guidance to school officials, and to ensure that the practice of strip-searching students remains appropriately rare.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place Ave.
Charlottesville, VA 22911
(434) 978-3888

Clint Bolick
Nicholas C. Dranias
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL LITIGATION
500 E. Coronado Road
Phoenix, AZ 85004
(602) 462 5000

Timothy Lynch
Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 218-4600

AMICUS CURIAE BRIEF

No. 08-479

In The
Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1; KERRY WILSON, Husband; JANE DOE WILSON, Wife; HELEN ROMERO, Wife; JOHN DOE ROMERO, Husband; PEGGY SCHWALLIER, Wife; JOHN DOE SCHWALLIER, Husband,

Petitioners,

v.

APRIL REDDING, Legal Guardian of Minor Child,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE URBAN JUSTICE CENTER, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ADVOCATES FOR CHILDREN OF NEW YORK, AND THE NATIONAL YOUTH RIGHTS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

RAYMOND H. BRESCIA
ALBANY LAW SCHOOL
80 New Scotland Ave.
Albany, NY 12208
(518) 445-3247
Counsel of Record
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 2

STATEMENT OF THE CASE 6

PROCEDURAL HISTORY 8

ARGUMENT 9

I. HISTORICALLY, THE COMMON LAW PROHIBITED TEACHERS ACTING *IN LOCO PARENTIS* FROM ENGAGING IN TREATMENT OF THEIR STUDENTS THAT WAS UNREASONABLE 9

A. Two Lines of Cases Emerged that Outlined the Scope of Reasonableness in the Teacher-Student Context 11

1. The *Pendergrass* line of cases held that reasonable treatment by a person standing *in loco parentis* could not cause lasting injury nor be the product of malicious intent, and in one such case, a strip search of a pre-teen girl was found unreasonable 12

2. The *Lander* line of cases held that a teacher's treatment of a student was unreasonable if it resulted in injury that was "clearly excessive" 14

TABLE OF CONTENTS – Continued

Page

B. "Reasonableness" in a Given Context Was Assessed in Light of the Totality of the Circumstances 15

C. Historically, Teachers Were Instructed to Act Reasonably Towards Their Students 17

D. The Limits on the *In Loco Parentis* Doctrine Were Not Reserved for Corporal Punishment Alone and the Lasting and Significant Injury that Would Result from a Strip Search Would Render that Search Unreasonable 19

1. The common law assessed the reasonableness of all treatment of students regardless of whether such treatment was corporal punishment 19

2. The nature of the injury often determined the reasonableness of the treatment that caused it 21

E. Strip Searches Were Inconsistent with the Traditions of the American Educational System, Which Required Teachers to Act Reasonably and to Be Guided By the Values of Decency, Modesty, and Humility 23

1. A central purpose of education was to instill morality and values in children 24

TABLE OF CONTENTS – Continued

Page

2. Historically, teachers were instructed to instill morals in their students by treating them with benevolence, modesty, and humility 25

3. Traditional educational values leave little doubt that a strip search of a student by a teacher or school administrator was likely beyond the bounds of acceptable treatment of students 27

II. MODERN ASSESSMENTS OF THE REASONABLENESS OF STUDENT STRIP SEARCHES ADOPT A TOTALITY OF THE CIRCUMSTANCES APPROACH AS THE APPROPRIATE MEASURE OF THE CONSTITUTIONALITY OF SUCH SEARCHES 28

A. Common Law Notions of "Reasonableness" Inform Interpretations of Constitutional Principles 28

B. Prior to *T.L.O.*, Courts Used the *In Loco Parentis* Doctrine to Extend Fourth Amendment Protections to Students, as Determined by the Totality of the Circumstances 31

C. This Court's Decision in *New Jersey v. T.L.O.* Adopted the Reasonableness Standard as Appropriate in Analysis of Searches of Students Under the Fourth Amendment 33

TABLE OF CONTENTS – Continued

Page

D. Circuit Courts Apply a Flexible Reasonableness Standard for Strip Searches 35

III. COMMON LAW PRINCIPLES, INFORMED BY MORE RECENT FOURTH AMENDMENT JURISPRUDENCE, COUNSEL THIS COURT TO FIND THAT THE SEARCH OF MS. REDDING WAS UNREASONABLE UNDER THE CIRCUMSTANCES, AND THUS, UNCONSTITUTIONAL 38

CONCLUSION 40

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aguilar v. Texas, 378 U.S. 108 (1964) 35

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 29

California v. Hodari D., 499 U.S. 621 (1991) 29

Camara v. Municipal Court, 387 U.S. 523 (1967) 30

Carpenter v. Commonwealth, 44 S.E.2d 419 (Va. 1947) 15

Carroll v. United States, 267 U.S. 132 (1925) 28

Clasen v. Pruhs, 95 N.W. 640 (Neb. 1903) 11

Cornfield v. Consolidated High School District, 991 F.2d 1316 (7th Cir. 1993) 22, 35, 36, 37

Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) 33

Eddings v. Oklahoma, 455 U.S. 104 (1982) 22

Florida v. Riley, 488 U.S. 445 (1989) 30

Hartman v. Moore, 547 U.S. 250 (2006) 29

Hedges v. Musco, 204 F.3d 109 (3d Cir. 2000) 35

Illinois v. Gates, 462 U.S. 213 (1983) 35

Ingraham v. Wright, 430 U.S. 651 (1977) 9, 10, 29

Jenkins v. Talladega City Board of Education, 115 F.3d 821 (11th Cir. 1997) 35

Justice v. City of Peachtree, 961 F.2d 188 (11th Cir. 1992) 22

TABLE OF AUTHORITIES – Continued

Page

Katz v. United States, 389 U.S. 347 (1967).....30

M.M. v. Anker, 477 F. Supp. 837 (E.D.N.Y. 1979).....32

M.M. v. Anker, 607 F.2d 588 (2d Cir. 1979) ...32, 33, 37

Morse v. Frederick, 127 S.Ct. 2618 (2007).....11

New Jersey v. *T.L.O.*, 469 U.S. 325 (1985).....*passim*

Payton v. New York, 445 U.S. 573 (1980).....28

Phaneuf v. Fraikin, 448 F.3d. 591 (2d Cir. 2006).....35, 36, 37

Redding v. Safford Unified School District, 531 F.3d 1071 (9th Cir. 2008).....8, 35

Terry v. Ohio, 392 U.S. 1 (1968).....34

United States v. Watson, 423 U.S. 411 (1976).....28

Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991).....35, 36

Wilson v. Arkansas, 514 U.S. 927 (1995).....29

Wyoming v. Houghton, 526 U.S. 295 (1999).....28

STATE CASES

A.B. v. State, 440 So.2d 500 (Fla. Dist. Ct. App. 1983).....32

Anderson v. State, 3 Tenn. (3 Head) 455 (1859).....15

Board of Education v. Helston, 32 Ill. App. 300 (1889).....20

Bowers v. State, 389 A.2d 341 (Md. 1978).....9

TABLE OF AUTHORITIES – Continued

Page

Boyd v. State, 7 So. 268 (Ala. 1890) 12, 13

Calway v. Williamson, 36 A.2d 377 (Conn. 1944) 20

Commonwealth v. Randall, 4 Gray 36 (Mass. 1855) 10

Cooper v. McJunkin, 4 Ind. 290 (1853) 14

Dean v. State, 8 So. 38 (Ala. 1890) 11, 16, 21

Dodd v. State, 126 S.W. 834 (Ark. 1910) 12

Drake v. Thomas, 33 N.E.2d 889 (Ill. App. Ct. 1941) 12

Drum v. Miller, 47 S.E. 421 (N.C. 1904) 11, 16

Ely v. State, 152 S.W. 631 (Tex. 1912) 16, 21

Fabian v. Maryland, 201 A.2d 511 (Md. 1964) 14

Fertich v. Michener, 11 N.E. 605 (Ind. 1887) 20, 21

Harris v. Galilley, 189 A. 779 (Penn. 1937) 16

Hathaway v. Rice, 19 Vt. 102 (1846) 15

Heritage v. Dodge, 9 A. 722 (N.H. 1887) 12

In re L.L., 280 N.W.2d 343 (Wis. Ct. App. 1979) 31, 32

Lander v. Seaver, 32 Vt. 114 (1859) .....*passim*

Marlar v. Bill, 178 S.W.2d 634 (Tenn. 1944) 12

Patterson v. Nutter, 7 A. 273 (Me. 1886) 15, 17

People v. Curtiss, 300 P. 801 (Ca. App. Dep't Super. Ct. 1931) 11, 15

People v. Green, 119 N.W. 1087 (Mich. 1909) 12, 13, 14

TABLE OF AUTHORITIES – Continued

Page

People v. Jackson, 319 N.Y.S.2d 731 (N.Y. App. Div. 1971) 31

People v. Scott D., 34 N.Y.2d 483 (1974) 31, 32

People v. Singletary, 37 N.Y.2d 310 (1975) 33

Rone v. Davies County Board of Education, 655 S.W.2d 28 (Ky. Ct. App. 1983) 31, 32

Sheehan v. Sturges, 2 A. 841 (Conn. 1885) 14

Spinelli v. United States, 393 U.S. 410 (1969) 35

Stanfield v. State, 43 Tex. 167 (1875) 17

State ex rel. Burpee v. Burton, 45 Wis. 150 (1878) 15, 20

State v. Baccino, 282 A.2d 869 (Del. Sup. Ct. 1971) 31

State v. D.T.W., 425 So.2d 1383 (Fla. Dist. Ct. App. 1983) 31, 32

State v. F.W.E., 360 So.2d 148 (Fla. Dist. Ct. App. 1978) 32

State v. Fischer, 60 N.W.2d 105 (Iowa 1953) 14

State v. Jones, 95 N.C. 588 (1886) 11

State v. Koonse, 101 S.W. 139 (Mo. Ct. App. 1907) 12, 16

State v. Pendergrass, 19 N.C. 365 (1837) ..... *passim*

State v. Speigel, 270 P. 1064 (Wyo. 1928) 11

State v. Straight, 347 P.2d 482 (Mont. 1959) 11

State v. Thornton, 48 S.E. 602 (N.C. 1904) 12, 16

TABLE OF AUTHORITIES – Continued

Page

State v. Vanderbilt, 18 N.E. 266 (Ind. 1888).....14, 20

Steber v. Norris, 206 N.W. 173 (Wis. 1925).....15

Territory v. Cox, 24 Haw. 461 (1918).....15

Tinkham v. Kole, 110 N.W.2d 258 (Iowa 1961).....17

CONSTITUTION

U.S. Const. amend. IV .....*passim*

U.S. Const. amend. VIII 29

STATUTES

Cal. Educ. Code § 49050 (West 2006) 37

Iowa Code § 808A.2(4)(a) (2003) 37

Mass. Gen. Laws. Ann. Ch. 71, § 30 (West 2008) 25

N.J. Stat. § 18A:37-6.1 (West 1999) 37

Okla. Stat. tit. 70, § 24-102 (2005).....37

S.C. Code Ann. § 59-63-1140 (2008) 37

Wash. Rev. Code § 28A.600.230 (2009) 37

Wis. Stat. § 118.32 (2008).....37

OTHER AUTHORITIES

Fitzgerald v. Northcote, 176 Eng. Rep. 734 (Q.B.) (1865) 20

TABLE OF AUTHORITIES – Continued

Page

1 William Blackstone, Commentaries on the Laws of England 9

2 James Kent, Commentaries on American Law 9, 10

2 *The Moral Reformer, and Teacher on the Human Constitution* (William A. Alcott ed., 1836) 27

Alanzo Potter & George B. Emerson, *The School and the Schoolmaster: A Manual for the use of Teachers, Employers, Trustees, Inspectors, &c., &c of Common Schools* (1873).....17

Arethusa Hall, *A Manual of Morals for Common Schools* (1850) 24

Handbook of Adolescent Psychology (Adelson ed., 1980) 22

Henry T. Terry, *Negligence*, 29 Harv. L. Rev. 40 (1915).....29

Horace Mann, *Lectures on Education* (1855) 24

Horace Mann, *Twelfth Annual Report, in The Republic and the School* (Lawrence Cremin ed., 1957) (1848).....24, 25

J. D. Lee & Barry A. Lindahl, *Modern Tort Law: Liability & Litigation* (1994).....29

John Gill, *Systems of Education: A History and Criticism of the Principles, Methods, Organizations, and Moral Discipline Advocated by Eminent Educationists* (1887) 27

TABLE OF AUTHORITIES – Continued

Page

J. R. Blakiston, *The Teacher: Hints on School Management* (1888) 26

John Swett, *Methods of Teaching: A Handbook of Principles, Directions, and Working Models for Common-School Teachers* (1880) 18

John T. Prince, *Courses and Methods: A Handbook for Teachers of Primary, Grammar, and Ungraded Schools* (1886) 18

Julia M. Dewey, *Lessons on Morals: Arranged for Grammar Schools, High Schools and Academies* (1899) 26

Louisa Hoare, *Hints for the Improvement of Early Education and Nursery Discipline* (1846) 26

Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 Neb. L. Rev. 455 (1983) 22

Papers for the Teacher (Henry Barnard ed., 1861) 27

Richard A. Leiter, *50 State Surveys: Education, General* (2007) 25

Samuel Read Hall, *The Instructor's Manual: Or Lectures On School-Keeping* (1852) 17

Steven F. Shatz, *et al.*, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1 (1991) 22

TABLE OF AUTHORITIES – Continued

Page

William J. Reese, *America's Public Schools: From the Common School to "No Child Left Behind"* (2005).....24

INTEREST OF *AMICI*[1]

The Urban Justice Center (UJC) is a not-for-profit legal services organization organized under the laws of the State of New York that provides free civil legal assistance to indigent clients in domestic violence, landlord-tenant, public assistance, and education matters. The UJC represents indigent youth in disciplinary proceedings in schools and in civil actions arising from strip searches in those schools and has an interest in ensuring that school officials follow the laws concerning such searches.

The Asian American Legal Defense and Education Fund (AALDEF), headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF's Educational Equity and Youth Rights Project promotes the rights of Asian American students in kindergarten through twelfth-grade public education. AALDEF counsels high school students about their rights and represents them in disciplinary hearings.

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are lodged herewith.

Advocates for Children of New York (AFC) is dedicated to ensuring access to the best education New York City can provide for all students. For over thirty-seven years, AFC has been working with low-income families in New York City to secure quality and equal public education services for their children. AFC provides a range of direct services, including free individual case advocacy, technical assistance, and trainings, and also works on institutional reform of educational policies and practices through advocacy and litigation.

The National Youth Rights Association (NYRA) is a not-for-profit organization founded in 1998, with nearly 10,000 members. NYRA is truly youth-led, as most of its membership and members of its board of directors are high school or college students. NYRA works to educate and empower students across the country to better ensure the protection of their civil rights and liberties.

SUMMARY OF ARGUMENT

Amici curiae write in support of Respondent in this action, April Redding, the mother of Savana Redding (Ms. Redding), in a challenge to the treatment Ms. Redding received as a pupil in middle school. Such treatment included a strip search by school officials based on the slenderest reed of suspicion: the allegations of another student accused of the same infraction, here, the possession of several pills

of prescription strength medicine. Ms. Redding had no prior disciplinary record and posed no threat to school security at the time of the search.

Historically, teachers have enjoyed certain powers over the children under their care, but such powers did not—and should not now—extend to permit the treatment carried out by Petitioners in this case. This brief reviews the common law traditions that, for centuries, guided teacher conduct in the treatment of students entrusted to their care. This brief concludes that these traditions would not have authorized the strip search of Ms. Redding challenged below.

For nearly the last fifty years, courts have reviewed the treatment of students by school officials using constitutional principles such as the rights to due process and privacy and the freedom from unreasonable searches and seizures. Prior to viewing the student-teacher relationship through the constitutional prism, however, U.S. courts assessed teacher treatment of pupils under principles of tort law, using the *in loco parentis* doctrine. Under this doctrine, the teacher stood in the place of parents in attending to the education of the children in his or her care, but could impose restrictions on and punish such children only if such treatment was reasonable. Although state courts across the nation used different tests to determine the propriety of teacher treatment of pupils, in the end, such treatment was always measured by this simple standard: whether such treatment was reasonable under the circumstances.

The historical record reveals that when measured by this common law standard of reasonableness, the treatment of Ms. Redding was improper. It was also unlikely to have occurred at all when the common law was in force. Whether based on common law traditions that limited the treatment of pupils to what was reasonable, teacher handbooks that instructed teachers to treat students reasonably and with decency, or American educational traditions that promoted the passing on of such values as modesty to students, the likelihood that teachers sought or exercised the right to strip search students is slim.

Indeed, *amici curiae* are aware of no reported case under the common law in which a teacher attempted to strip search a pre-teen girl. It is respectfully submitted, however, that such treatment was so unreasonable that teachers did not seek, nor did they obtain, authority to engage in such conduct. Under the common law, in the only reported case of which the *amici curiae* are aware under the *in loco parentis* doctrine that involved the disrobing of an adolescent girl, there by an adoptive father, the Supreme Court of Michigan found the parent's treatment utterly unreasonable and allowed the parent's *criminal* conviction for assault and battery to stand.

Today, searches of students in schools are measured against modern Fourth Amendment principles. But those principles have long been informed by the common law, and the historical review that follows illuminates how the common law would have treated the search of Ms. Redding. Furthermore, through a

review of modern Fourth Amendment jurisprudence dealing with searches of students in schools, one is presented with a modern understanding of what searches are appropriate in the school setting and what are not. This modern understanding actually comports with the common law tradition: what is proper is determined by what is reasonable under the circumstances. In fact, when assessing the reasonableness of school practices, common law courts required that any treatment of students had to be proportional to the offense, could not cause lasting injury, and could not be excessive. Similarly, modern courts have required the presence of exigent circumstances to justify strip searches in schools. Under both historical principles and Fourth Amendment jurisprudence, a school action as invasive and intrusive as a strip search is acceptable only when a heightened level of reasonable suspicion is present and only in the most extreme circumstances.

Assessing the facts and circumstances in the instant case against the common law traditions that guided teacher treatment of their students for centuries, and more modern Fourth Amendment jurisprudence surrounding searches of students in schools, the treatment of Ms. Redding was unreasonable and thus, unconstitutional. Accordingly, this brief of *amici curiae* respectfully requests that this Court affirm the decision of the Ninth Circuit Court of Appeals sitting *en banc*.

STATEMENT OF THE CASE

Thirteen-year-old Savana Redding was an eighth grader at Safford Middle School in Safford, Arizona. J.A. 21a; Pet. App. 2a. Ms. Redding was an honors student who had never been disciplined for violating school policy. J.A. 21a.

On October 8, 2003, Safford Middle School Assistant Principal Kerry Wilson removed Ms. Redding from class and led her to his office for questioning. *Id.* When they arrived, Ms. Redding saw her planner on Wilson's desk along with a cigarette, lighters, and knives. *Id.* at 22a. Ms. Redding told Wilson the planner was hers, but the other items were not. *Id.* Ms. Redding described how she had lent that planner to her classmate, Marissa Glines, so Ms. Glines could hide certain items from her parents. *Id.*

Wilson questioned Ms. Redding about prescription ibuprofen pills delivered to Wilson by another student. *Id.* at 12a, 13a. Possession of prescription medication without permission was a violation of school policy. *Id.* Ms. Redding insisted that she knew nothing about these pills, had never brought prescription pills to school, and had never given pills to others. *Id.* at 22a.

Ms. Redding's spotless school disciplinary record notwithstanding, Wilson asked her if he and his assistant, Helen Romero, could search her backpack. *Id.* Redding consented. *Id.* Nothing was found. *Id.* Regardless, Wilson ordered the strip search of Ms. Redding. *Id.*

The search was conducted by the school nurse in her office at the direction and in the presence of Romero. *Id.* Ms. Redding was required to take off her socks, shoes, and jacket for inspection. *Id.* at 23a. The women instructed Ms. Redding to take off the stretch pants and t-shirt she was wearing. *Id.* at 22a. "Embarrassed and scared," Ms. Redding did as the women said and, on the verge of tears, was made to "pull her bra out to the side" and "her underwear at the crotch" and shake them to dislodge any hidden pills. *Id.* at 24a. This required Ms. Redding to "expose[ ] her naked breasts" and "pelvic area" to the women who did not turn away, thus adding to her humiliation. *Id.* Nothing was found. *Id.* at 23a.

When later asked about the "most humiliating experience" of her life, Ms. Redding testified that she complied with the nonconsensual strip search because she thought that she "would be in more trouble if [she] did not do what they asked." *Id.* at 25a.

The decision to interrogate and later strip search Ms. Redding came after a student, Jordan Romero, who had produced a pill, informed Wilson of a plan by students to take ibuprofen at lunchtime. *Id.* at 12a. This student implicated Ms. Glines, not Ms. Redding. Pet. App. 6a, 7a. Wilson questioned Ms. Glines who turned over the planner lent to her by Ms. Redding. J.A. 12a. A search of it revealed no pills. *Id.*

A search of Ms. Glines' person uncovered ibuprofen and an additional blue pill in her pockets. *Id.* Ms. Glines stated that the blue one must have "slipped in

when [Ms. Redding] gave me the" ibuprofen. *Id.* at 13a. Ms. Glines provided no further information regarding when or where Ms. Redding allegedly gave her the pills. Pet. App. 8a. Ms. Glines was then subjected to a less invasive strip search than was conducted of Ms. Redding. J.A. 16a. Ms. Glines' statement was the only basis for the humiliating search of Ms. Redding.

PROCEDURAL HISTORY

The underlying suit was commenced in the United States District Court for the District of Arizona against the Safford School District and the three school employees. *Redding v. Safford Unified Sch. Dist.*, 531 F.3d 1071, 1077-78 (9th Cir. 2008). The District Court granted summary judgment in favor of the defendants, which was affirmed by a divided panel of the United States Court of Appeals for the Ninth Circuit. *Id.* at 1078. The Ninth Circuit, however, sitting *en banc*, vacated the panel's decision and held that "[t]he strip search of thirteen-year-old Savana did not satisfy either prong of [*New Jersey v.*] *T.L.O.*[, 469 U.S. 325 (1985)] and therefore was conducted in violation of Savana's Fourth Amendment rights." *Safford*, 531 F.3d at 1089.

ARGUMENT

I. HISTORICALLY, THE COMMON LAW PROHIBITED TEACHERS ACTING *IN LOCO PARENTIS* FROM ENGAGING IN TREATMENT OF THEIR STUDENTS THAT WAS UNREASONABLE.

As this Court noted in *Ingraham v. Wright*, 430 U.S. 651 (1977), from the early days of the republic, treatment of students by school officials was governed by the common law doctrine of *in loco parentis*. *Id.* at 661-62; *see also Bowers v. State*, 389 A.2d 341, 348 (Md. 1978). Parents had a duty to educate and raise their children, and this duty was delegated to school officials who stood "in the place of the parents" while children were entrusted to those officials' care. 2 James Kent, Commentaries on American Law *203; *State v. Pendergrass*, 19 N.C. 365, 367 (1837). Sir William Blackstone described the relationship between student and teacher in his commentaries as follows:

> [The parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 William Blackstone, Commentaries on the Laws of England *453.

American common law adopted the *in loco parentis* doctrine. *Pendergrass*, 19 N.C. at 367; *Commonwealth v. Randall*, 4 Gray 36, 38-39 (Mass. 1855). James Kent treated the doctrine nearly identically to Blackstone: "[T]he power allowed by law to the parent over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purpose of education." 2 James Kent, Commentaries on American Law *205.

The authority delegated from parent to teacher was not limitless, however. As the following discussion shows, and as this Court's opinion in *Ingraham, supra,* recognized, under the common law, a single principle guided the treatment of students by teachers acting *in loco parentis*: such treatment must have been reasonable. 430 U.S. at 661.[2] What follows is an historical overview of the common law doctrine of *in loco parentis*. This overview recounts the historical treatment by the courts of the relationship between teacher and student. It also offers evidence that teachers were expected to treat their students with respect and decency, and to impart the values of modesty and humility. The historical record is mostly silent as to the legitimacy of strip searches of students under the common law, however. When viewed against the landscape of the common law and the

---

[2] Whether the strip search in the instant case would have been assessed under the common law with respect to its reasonableness even though it did not involve corporal punishment *per se* is addressed in Section I.D., *infra*.

backdrop of American educational traditions and values, this absence strongly suggests that such acts were hardly common, and were certainly not condoned.

A. Two Lines of Cases Emerged that Outlined the Scope of Reasonableness in the Teacher-Student Context.

Two lines of cases emerged defining the contours of reasonableness in the educational context. *Morse v. Frederick*, 127 S.Ct. 2618, 2631-33 (2007) (Thomas, J., dissenting); *see also People v. Curtiss*, 300 P. 801, 802-03 (Cal. App. Dep't Super. Ct. 1931). The first, following the decision in *Pendergrass*, *supra,* held that a teacher's treatment of a student was reasonable unless it caused permanent injury or was carried out with malicious intent. 19 N.C. at 367. The second, which was consistent with the Supreme Court of Vermont's decision in *Lander v. Seaver*, 32 Vt. 114 (1859), and was the prevailing precedent in a majority of states, held that a teacher acted unreasonably unless reasonable men would consider the treatment in question excessive. *Id.* at 123. Under either line, reasonableness was a question left to the jury. *See Dean v. State*, 8 So. 38, 39 (Ala. 1890); *State v. Straight*, 347 P.2d 482, 490 (Mont. 1959); *Clasen v. Pruhs*, 95 N.W. 640, 642 (Neb. 1903); *Drum v. Miller*, 47 S.E. 421, 435 (N.C. 1904); *State v. Jones*, 95 N.C. 588, 589 (1886); *State v. Speigel*, 270 P. 1064, 1065 (Wyo. 1928).

1. The *Pendergrass* line of cases held that reasonable treatment by a person standing *in loco parentis* could not cause lasting injury nor be the product of malicious intent, and in one such case, a strip search of a preteen girl was found unreasonable.

Under *Pendergrass*, the *in loco parentis* doctrine deemed treatment unreasonable, and thus illegal, where it caused lasting injury or was the product of malicious intent. *See Boyd v. State*, 7 So. 268, 269 (Ala. 1890); *Dodd v. State*, 126 S.W. 834, 835 (Ark. 1910); *Drake v. Thomas*, 33 N.E.2d 889, 891 (Ill. App. Ct. 1941); *People v. Green*, 119 N.W. 1087, 1089 (Mich. 1909); *Heritage v. Dodge*, 9 A. 722, 723 (N.H. 1887); *State v. Thornton*, 48 S.E. 602, 602-03 (N.C. 1904); *Pendergrass*, 19 N.C. at 367; *Marlar v. Bill*, 178 S.W.2d 634, 635 (Tenn. 1944).

For example, a number of courts following *Pendergrass* allowed juries to infer malice from treatment that was "unreasonably severe." *E.g.*, *Boyd*, 7 So. at 270; *Green*, 119 N.W. at 1090; *State v. Koonse*, 101 S.W. 139, 142 (Mo. Ct. App. 1907). Similarly, where the punishment exceeded the gravity of the infraction, the Supreme Court of Alabama upheld the conviction of a teacher who beat a student for swearing. *Boyd*, 7 So. at 271. In so holding, the *Boyd* court concluded: "From this unseemly conduct on the part of one whose duty it was to set a good example of self-restraint and gentlemanly deportment to his pupils, there was ample room for the inference of legal

malice, in connection with *unreasonable* and *immoderate* correction." *Id.* (emphasis added).

Admittedly, under the common law, reported cases involving strip searches of students are rare. But in the one reported case *amici curiae* could locate that involved the disrobing of a young girl, the court there applied the *in loco parentis* doctrine to assess the treatment of a twelve-year-old girl by her adoptive father. *Green*, 119 N.W. at 1087. There, the Supreme Court of Michigan applied *Pendergrass* to uphold the criminal conviction of a father who assaulted his daughter for the alleged theft of a fifty-cent piece. *Id.* at 1087, 1090. The father, after his daughter refused to admit to stealing the money, forced her to strip naked, whipped her, and left her bound for nearly two days. *Id.* at 1087-88. In ruling that the evidence could sustain the conviction, the court held that "[i]t is sufficient to show that the punishment was cruel and unreasonably severe, and such as in its very nature would negative the idea of good faith on the part of the parent." *Id.* at 1090.

Clearly, the facts surrounding the treatment in *Green* are easily distinguished from the search in the instant case because there, the defendant not only stripped his daughter, but also beat her. But the *Green* court was deeply concerned by the act of forcing the girl to disrobe. Indeed, the court described that conduct as "one of the most serious elements of the respondent's offense . . . [which] tended to shock [the victim's] modesty, to break down her sense of decency and the inviolability of her person." *Id.* When

viewed in the light of the sensibilities of the times, the *Green* court's clear discomfort with the disrobing of the girl, coupled with the absence of other precedent dealing with similar situations, suggest not only the extreme nature of such treatment, but also its rarity.

Thus, the *Pendergrass* line of cases applied a reasonableness standard under the *in loco parentis* doctrine to place limits on the authority of teachers in their interactions with, and treatment of, their students. In the one case that involved the disrobing of a young girl, the court found such conduct not only utterly unreasonable, but also criminal.

2. The *Lander* line of cases held that a teacher's treatment of a student was unreasonable if it resulted in injury that was "clearly excessive."

The *Lander* line of cases held that treatment of a child by one standing *in loco parentis* was unreasonable when it went beyond "moderate correction"; when it did, it was considered "clearly excessive" and illegal. *Sheehan v. Sturges*, 2 A. 841, 842 (Conn. 1885); *State v. Vanderbilt*, 18 N.E. 266, 267 (Ind. 1888) ("[W]here . . . the punishment is not administered with unreasonable severity, a proceeding for an assault and battery cannot be maintained against the teacher."); *Cooper v. McJunkin*, 4 Ind. 290, 291-92 (1853); *State v. Fischer*, 60 N.W.2d 105, 109-10 (Iowa 1953); *Fabian v. Maryland*, 201 A.2d 511, 518 (Md.

1964); *Patterson v. Nutter*, 7 A. 273, 274-75 (Me. 1886); *Anderson v. State*, 3 Tenn. (3 Head) 455 (1859) ("Nor must his chastisements be cruel or excessive, but reasonably proportioned to the offense, and in the bounds of moderation."); *Lander*, 32 Vt. at 120; *Hathaway v. Rice*, 19 Vt. 102, 107 (1846) ("[T]he right of a school master to correct his scholar [is] a right which has always been practically and judicially sanctioned. But it . . . must not exceed the limits of a moderate correction."); *Carpenter v. Commonwealth*, 44 S.E.2d 419, 423 (Va. 1947) ("[T]he great preponderance of authority is to the effect that a parent has a right to punish a child within the bounds of moderation and reason, so long as he does it for the welfare of the child. . . ."); *Steber v. Norris*, 206 N.W. 173, 175 (Wis. 1925); *State ex rel. Burpee v. Burton*, 45 Wis. 150, 155-56 (1878); *Curtiss*, 300 P. at 803; *Territory v. Cox*, 24 Haw. 461, 465 (1918).

Thus, like the cases adhering to *Pendergrass*, courts following *Lander* required that school officials act reasonably in their treatment of students.

B. "Reasonableness" in a Given Context Was Assessed in Light of the Totality of the Circumstances.

Under both the *Pendergrass* and *Lander* lines of cases, whether the treatment of a particular student was reasonable was considered in light of the totality of the circumstances surrounding the interaction. Application of the *Pendergrass* test permitted juries to

consider the totality of the circumstances when determining whether a teacher acted with malice towards, or caused lasting injury to, a student. *Dean*, 8 So. at 39 ("In determining the question of the reasonableness of the correction, or the existence of malice, the jury may consider the nature of the instrument used, and all the other attendant circumstances."); *Koonse*, 101 S.W. at 142 (upholding trial court's decision to allow evidence of past treatment as relevant to determining malice in the treatment at bar); *Drum*, 47 S.E. at 422 (finding that "a teacher is liable if, in correcting or disciplining a pupil, he acts maliciously or inflicts a permanent injury"; and finding further that "any act done in the exercise of [a teacher's] authority, and not prompted by malice, is not actionable . . . unless a person of ordinary prudence could reasonably foresee that a permanent injury of some kind would naturally or probably result"); *Thornton*, 48 S.E. at 603; *Harris v. Galilley*, 189 A. 779, 782 (Pa. Super. Ct. 1937) ("It is always a question of fact, for the jury to determine from all the attending circumstances whether a punishment inflicted was reasonable and proper or excessive."); *Ely v. State*, 152 S.W. 631, 632 (Tex. Crim. App. 1912) ("Whether [the treatment] is moderate or excessive must necessarily depend upon the age, sex, condition, and disposition of the child; with all the attending and surrounding circumstances, to be judged of by the jury under directions of the court as to the law of the case.").

Similarly, under *Lander*, while determining whether treatment was "clearly excessive," courts

considered, *inter alia*, the nature of the student's conduct; the student's age, sex, and size; the nature of the treatment; and the mindset of the teacher. *See, e.g.*, *Patterson*, 7 A. at 275; *Stanfield v. State*, 43 Tex. 167, 168 (1875) ("[w]hether [the treatment] is moderate or excessive must necessarily depend upon the age, sex, condition, and disposition of the child, with all the attending and surrounding circumstances, to be judged of by the jury"). For example, in *Tinkham v. Kole*, 110 N.W.2d 258 (Iowa 1961), the Supreme Court of Iowa overturned a trial court's grant of a directed verdict to a teacher who was sued for striking a student. 110 N.W.2d 258, 258-59, 263 (Iowa 1961). The *Tinkham* court considered the acts of a teacher who had ruptured a student's eardrum when he struck that student for failing to take off his gloves quickly. *Id.* at 263. The court concluded that "consideration of the nature of the punishment itself, the nature of the pupil's misconduct which gave rise to the punishment, the age and physical condition of the pupil, and the teacher's motive in inflicting the punishment" could lead a fair-minded jury to find that the conduct was clearly excessive. *Id.* at 261, 263.

C. Historically, Teachers Were Instructed to Act Reasonably Towards Their Students.

Although the common law, and later statutes, imposed restrictions on the treatment of students by teachers, enshrined within the principles of the

teaching profession was the understanding that teacher conduct should be limited to what was reasonable, especially when physical contact with the student was at issue. Indeed, teaching manuals dating back to the nineteenth century have urged teachers to act reasonably with regard to the treatment of their students and use the least restrictive means in doing so. *See, e.g.*, Samuel Read Hall, *The Instructor's Manual: Or Lectures On School-Keeping* 135 (1852) (describing that a teacher's treatment of a student "should be varied with the disposition, age, or circumstances of the scholar, or the nature of his offence. It is undoubtedly true, that corporeal punishment should be the last resort. When everything else fails, you may have recourse to that."); Alanzo Potter & George B. Emerson, *The School and the Schoolmaster: A Manual for the use of Teachers, Employers, Trustees, Inspectors, &c., &c of Common Schools* 281 (1873) (describing that a teacher "should endeavour to be reasonable, and should treat [the students] as reasonable beings"); John T. Prince, *Courses and Methods: A Handbook for Teachers of Primary, Grammar, and Ungraded Schools* 330-31 (1896) (describing the pitfalls of acting unreasonably, and noting that if teachers make decisions "in a hasty way, considering them after they are given rather than before, or if [their] decisions are arbitrary, with no apparent justice in them even to the child himself, there will be much opposition on his part, not only to [their] unjust decisions, but to all decisions [they] may give"); John Swett, *Methods of Teaching: A Handbook of Principles, Directions, and Working Models for*

Common-School Teachers 76 (1883) (suggesting that punishment meted out by the teacher should reasonably fit the offense, and that "'[i]t is a rule in punishment,' . . . 'to try slight penalties at first; with the better natures, the mere idea of punishment is enough; severity is entirely unnecessary. It is a coarse and blundering system that knows of nothing but the severe and degrading sorts.'") (citation omitted).

D. The Limits on the *In Loco Parentis* Doctrine Were Not Reserved for Corporal Punishment Alone and the Lasting and Significant Injury that Would Result from a Strip Search Would Render that Search Unreasonable.

1. The common law assessed the reasonableness of all treatment of students regardless of whether such treatment was corporal punishment.

That Ms. Redding was subjected to a strip search that did not consist of corporal punishment does not change the analysis under the principles of the *in loco parentis* doctrine. The school restrained and strip searched Ms. Redding pursuant to its enforcement of school rules prohibiting the distribution of contraband on school grounds. Under the common law, such treatment of a student was still assessed for its reasonableness regardless of whether corporal punishment was involved. Indeed, common law courts routinely applied the reasonableness test of the *in loco parentis* doctrine to cases involving the enforcement of

school rules generally. *See, e.g.*, *Fertich v. Michener*, 11 N.E. 605, 610-11 (Ind. 1887) (applying *in loco parentis* jurisprudence to the enforcement of a tardiness policy); *see also Fitzgerald v. Northcote*, (1865) 176 Eng. Rep. 734, 736 (Q.B.) (analyzing restraint of a student under *in loco parentis*).

For example, in *Calway v. Williamson*, 36 A.2d 377 (Conn. 1944), the Supreme Court of Connecticut considered the acts of a principal in restraining a student to be unreasonable, where such restraint injured the student. *Id.* at 379. There, a principal restrained a student by placing his weight on the student, which ultimately injured the child. *Id.* at 378. The court used the reasonableness test to assess the principal's restraint of the student, concluding as follows: "There is no distinction in the application of the test between punishment and acts of restraint incident to discipline." *Id.* at 379. It ultimately found the action of the principal unreasonable.

Often actions incident to the enforcement of school rules were analyzed under the *in loco parentis* doctrine, regardless of whether physical punishment was involved. *See, e.g.*, *State v. Vanderbilt*, 18 N.E. 266, 267 (Ind. 1888) (finding that any treatment designed to enforce a rule the teacher lacked authority to impose was in violation of *in loco parentis*); *Fertich*, 11 N.E. at 610-11 (locking student out of schoolhouse to enforce tardiness policy unreasonable); *State ex rel. Burpee*, 45 Wis. at 150 (applying *Pendergrass* test to a student's suspension from school); *Bd. of Educ. v. Helston*, 32 Ill. App. 300, 304 (1889)

(applying reasonableness test to student's suspension from school).

In *Fertich v. Michener,* the court concluded that locking a tardy student out of class, as required by school rules, was unreasonable when enforced on an extremely cold day against a ten-year-old girl where that student suffered frostbite as a result. *Fertich,* 11 N.E. at 610. The court found that schools may promulgate and enforce rules with "due regard . . . to the health, comfort, age, and mental as well as physical condition of the pupils" and that "[n]o rule, however reasonable it may be in its general application, ought to be enforced when to enforce it will inflict actual and unnecessary suffering upon a pupil." *Id.*

2. The nature of the injury often determined the reasonableness of the treatment that caused it.

The reasonableness test of the *in loco parentis* doctrine did not hinge on whether the injurious treatment of children was considered "punishment" by those inflicting such injuries. In no case, even when a teacher invoked a defense of good faith, did a court ask whether the treatment in question was "punishment." Instead, courts focused on the nature of the injury, the proportionality of the treatment to the student's conduct, and the student's age. *Dean*, 30 So. at 39; *Ely*, 52 S.W. at 632. Thus, the *in loco parentis* doctrine not only contemplated its application to cases of treatment other than punishment, but also

took into account the severity of the injury caused by the treatment in question.

Under both the *Lander* and *Pendergrass* lines of cases, the injuries sustained through the strip search of a thirteen-year-old girl would have been cognizable at common law. It is without question that strip searches, when conducted on adolescents, exact lasting injury. *Justice v. City of Peachtree*, 961 F.2d 188, 192 (11th Cir. 1992). As this Court has said, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). A strip search subjects adolescents, in particular, to great trauma. *Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1321 n.1 (7th Cir. 1993); *see also* Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 Neb. L. Rev. 455, 486 (1983); *Handbook of Adolescent Psychology* 144 (Adelson ed., 1980). Those subjected to strip searches often suffer from sleep disturbance, inability to concentrate, anxiety, and depression. Steven F. Shatz, *et al.*, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991). Such injuries would have constituted lasting injury under a *Pendergrass* analysis and would have rendered such treatment excessive under *Lander*. As a result, the act that caused those injuries would have violated the reasonableness standard under the *in loco parentis* doctrine under both lines of cases.

Thus, regardless of whether Assistant Principal Wilson intended the strip search itself to be punishment, the doctrine of *in loco parentis* would have been relevant to that search because it involved a school official enforcing school policies against a student in such a way that would cause that student serious and lasting injury.

E. Strip Searches Were Inconsistent with the Traditions of the American Educational System, Which Required Teachers to Act Reasonably and to Be Guided By the Values of Decency, Modesty, and Humility.

For centuries, the American educational system had as one of its goals the teaching of skills as well as values, including modesty and decency. Teachers were instructed to impart and personify those values as an example to their students. Given these traditions, it is not surprising that the common law is largely silent on the legitimacy of strip searches in schools. It is respectfully submitted that such an act would have been so abhorrent to traditional educational values in the early days of the republic that this absence is entirely plausible. It is more likely that teachers did not attempt to conduct such searches in schools at all.

1. A central purpose of education was to instill morality and values in children.

Horace Mann, the father of American public education, envisioned education of children as their salvation. William J. Reese, *America's Public Schools: From the Common School to "No Child Left Behind"* 23 (2005). As such, Mann believed education should do more than impart the skills necessary for "read[ing], writ[ing], and keep[ing] common accounts." Horace Mann, *Lectures on Education* 117 (1855). Rather, Mann intended common schools to instill morals and values in students. Horace Mann, *Twelfth Annual Report, in The Republic and the School* 79-112 (Lawrence Cremin ed., 1957) (1848) (arguing that "[m]oral education is a primal necessity of social existence," and that "a community without a conscience would soon extinguish itself").

This moral focus of schooling emphasized the teaching of such values as humility and modesty. *See* Horace Mann, *Lectures on Education* 9 (1855) (explaining that "parental, patriotic, and religious motives" were employed on behalf of his cause); *see also* Arethusa Hall, *A Manual of Morals for Common Schools* 67-71 (1850) (describing the utmost importance of the values of humility and modesty in schools to ourselves and others: "Humility and modesty might, perhaps, with as much propriety, be classed among our duties to others"). Some state statutes have imposed a requirement on teachers to instill such values, and such requirements are still in effect

today in at least one jurisdiction notwithstanding legal developments since that have rendered the explicit incorporation of religious teachings into public school curriculum clearly unconstitutional. *See* Mass. Gen. Laws. ch. 71, § 30 (2008) (originally enacted Mass. Gen. Laws ch. 19, § 4 (1789)). This statute still provides as follows:

> [A]ll . . . instructors of youth shall exert their best endeavors to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice and a sacred regard for truth, love of their country, humanity and universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, and those other virtues which are the ornament of human society and the basis upon which a republican constitution is founded . . .

Id.; *see also* Horace Mann, *Twelfth Annual Report*, *supra* at 106 (quoting Massachusetts law); Richard A. Leiter, *50 State Surveys: Education, General* (2007) ("Some early state constitutions . . . specifically state that the government was responsible for the training of children in morals. . . .").

2. Historically, teachers were instructed to instill morals in their students by treating them with benevolence, modesty, and humility.

Since the nineteenth century, teachers have been directed to act with reasonableness in the instruction

of their students. *See supra* Part I.C. Educators have also been trained to treat students with benevolence, modesty, and temperance since the nineteenth century.

> One manual instructed teachers as follows:
>
> > [A] teacher should show the utmost tenderness and encouragement of the timid, the dull, the weakly, the afflicted, and all to whom home circumstances . . . make sympathy and consideration especially needful and welcome. . . . Whenever [the teacher] is satisfied that it is his duty to inflict punishment he should make it clear that he does it unwillingly, sorrowfully.
>
> J. R. Blakiston, *The Teacher: Hints on School Management* 4, 6 (1888).
>
> Another provided the following guidance:
>
> > [T]he fear of having his own rights, in any way, infringed; the suspicion that he may not receive his due, – render a child irritable and contentious; whilst the certainty that he shall himself be treated with entire justice and impartiality, satisfies his mind, composes his spirit, and prepares him to impart, with liberality, what he knows is altogether in his power.
>
> Louisa Hoare, *Hints for the Improvement of Early Education and Nursery Discipline* 61-62 (1846).

Other manuals provided similar instructions to teachers. Julia M. Dewey, *Lessons on Morals: Arranged*

for Grammar Schools, High Schools and Academies 23 (1899) (explaining the importance of cleanliness in attaining the very important "virtues, especially those of purity, modesty, delicacy and decency"); 2 *The Moral Reformer, and Teacher on the Human Constitution* 380 (William A. Alcott ed., 1836) ("Both rewards and punishments should be proportioned to offences. They should be dealt out with all the impartiality a man requires a court of justice.").

Teaching handbooks also encouraged teachers to act so as not to degrade or bring disgrace to their students. John Gill, *Systems of Education: A History and Criticism of the Principles, Methods, Organizations, and Moral Discipline Advocated by Eminent Educationists* 8 (1887) ("Correction of mistakes or faults should not degrade, nor discourage, but stimulate."); *Papers for the Teacher* 187 (Henry Barnard ed., 1861) ("Punishment, whether by words or actions, should not be of a disgraceful character." (quoting Cicero)).

3. Traditional educational values leave little doubt that a strip search of a student by a teacher or school administrator was likely beyond the bounds of acceptable treatment of students.

As the previous discussion shows, teachers were instructed to instill in their students a range of virtues, including modesty. Furthermore, they were to act reasonably with respect to those students in

meting out punishment and enforcing school rules. They were also to refrain from engaging in degrading or disgraceful treatment of their students. It is thus difficult to imagine that within the very schoolhouse where teachers were supposed to impart the virtues of modesty and decency and humility, and where teachers were to treat students with respect and grace and dignity, that teachers might also have the authority to strip and search the very pupils entrusted to their care.

II. MODERN ASSESSMENTS OF THE REASONABLENESS OF STUDENT STRIP SEARCHES ADOPT A TOTALITY OF THE CIRCUMSTANCES APPROACH AS THE APPROPRIATE MEASURE OF THE CONSTITUTIONALITY OF SUCH SEARCHES.

A. Common Law Notions of "Reasonableness" Inform Interpretations of Constitutional Principles.

This Court regularly consults the common law in clarifying the meaning of the Fourth Amendment. *See, e.g., Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *United States v. Watson*, 423 U.S. 411, 418-20 (1976); *Carroll v. United States*, 267 U.S. 132, 149 (1925). It has recognized that the common law provides crucial insight into "what the Framers of the Amendment might have thought to be reasonable." *Payton v. New York*, 445 U.S. 573, 591 (1980). Searches must be "reasonable" under the Fourth Amendment and analysis of the common law guides

the Court's "effort to give content to [the] term." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

Moreover, it is helpful to look to common law torts "when [this Court] think[s] about elements of actions for constitutional violations." *Hartman v. Moore*, 547 U.S. 250, 258 (2006); *see California v. Hodari D.*, 499 U.S. 621, 624-25 (1991); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 231-32 (1970). With these considerations in mind, it is appropriate to look to the common law with respect to discipline of children as a guidepost for analyzing the constitutionality of strip searches in schools today. *Cf. Ingraham v. Wright*, 430 U.S. 651, 659-60 (1977) (discussing the applicability of common law concepts of corporal punishment under the Eighth Amendment).

Historically, courts have recognized the adaptive nature of the common law standard of reasonableness in tort actions. *See* J. D. Lee & Barry A. Lindahl, *Modern Tort Law: Liability & Litigation* § 3:09, at 40-41 (1994) (describing "reasonableness" as a constantly changing concept that evolves with the norms of society); Henry T. Terry, *Negligence*, 29 Harv. L. Rev. 40, 48-49 (1915) (reasonableness is based on community standards which rely on the "teachings of common experiences" of individuals at the time of the events in question). This reasonableness standard extends to the Fourth Amendment protection from unreasonable searches and seizures. In order to protect individuals, this Court "balanc[es] the need to search against the invasion which the search entails." *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (quoting

Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)). This balancing test, however, does not operate in a vacuum; instead, it must comport with evolving societal norms. *See Florida v. Riley*, 488 U.S. 445, 454-55 (1989) (O'Connor, J., concurring) (acknowledging the fluid nature of the reasonable expectation of privacy depends on what "society is prepared to recognize as 'reasonable.'") (quoting *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

What follows is a review of modern cases and their treatment of the issue of reasonableness in the context of student strip searches in schools, albeit when measured through the lens of the Fourth Amendment's proscriptions. It is respectfully submitted that the modern treatment of the issue resembles the common law's approach: searches of students in schools must be reasonable under the circumstances. This review suggests not only that the common law has informed Fourth Amendment jurisprudence, but also that this same jurisprudence has defined the contours of reasonableness in this context, and thus gives renewed meaning to, and reaffirms, the common law's earlier limitations.

B. Prior to *T.L.O.*, Courts Used the *In Loco Parentis* Doctrine to Extend Fourth Amendment Protections to Students, as Determined by the Totality of the Circumstances.

Prior to this Court's decision in *New Jersey v. T.L.O.*, courts upheld searches conducted by school officials acting *in loco parentis*, requiring that officials review the unique facts and circumstances of each case prior to conducting such searches. *See State v. Baccino*, 282 A.2d 869, 872 (Del. Super. Ct. 1971); *People v. Jackson*, 319 N.Y.S.2d 731, 734 (N.Y. App. Div. 1971) (noting that school officials are *in loco parentis* "to pupils under [their] charge, and may exercise such powers of control, restraint and correction over [those pupils] as may be reasonably necessary to enable [them to] properly perform [their] duties as a teacher and accomplish the purposes of education"); *In re L.L.*, 280 N.W.2d 343, 348-49 (Wis. Ct. App. 1979) (noting the state's interest in the education of children and the state's duty to maintain order). At the same time, students were not afforded full protection against searches under the Fourth Amendment because various courts used a standard of "reasonable suspicion," rather than probable cause. *See State v. D.T.W.*, 425 So.2d 1383, 1386-87 (Fla. Dist. Ct. App. 1983); *People v. Scott D.*, 34 N.Y.2d 483, 488 (1974); *Jackson*, 319 N.Y.S.2d at 736; *In re L.L.*, 280 N.W.2d at 350-51.

The degree of reasonableness needed to justify a search rested upon the articulable and particularized facts of each case. *See D.T.W.*, 425 So.2d at 1386; *Rone*

v. Davies County Bd. of Educ., 655 S.W.2d 28, 30-31 (Ky. Ct. App. 1983); *In re L.L.*, 280 N.W.2d at 351. Factors considered when determining whether the search was reasonable included the child's age and school record, the prevalence and seriousness of the offense, the need to make the search immediately, the reliability of the information used as justification, and the school official's experience with the students. *See D.T.W.*, 425 So.2d at 1387; *A.B. v. State*, 440 So.2d 500, 500-01 (Fla. Dist. Ct. App. 1983); *Scott D.*, 34 N.Y.2d at 489; *In re L.L.*, 289 N.W.2d at 351.

Before *T.L.O.*, a student search was considered reasonable if the school official possessed "reasonable suspicion" founded on knowledge or beliefs regarding a particular student. *See, e.g.*, *M.M. v. Anker*, 477 F. Supp. 837, 842 (E.D.N.Y. 1979), *aff'd*, 607 F.2d 588 (2d Cir. 1979) (holding general suspicion insufficient to support the search of a student); *State v. F.W.E.*, 360 So.2d 148, 149-50 (Fla. Dist. Ct. App. 1978) (upholding a search of a student as reasonable where the school official observed such indicia of intoxication as stumbling, bloodshot eyes, and slurred speech); *Rone*, 655 S.W.2d at 30-31 (holding a search based upon a student's own statements regarding his use, possession, and distribution of drugs, as reasonable); *People v. Singletary*, 37 N.Y.2d 310, 311 (1975) (noting justification for search where based on a tip from a reliable informant who had provided "similar information on five prior occasions," leading to the seizure of drugs in each instance).

Finally, the Second Circuit adopted a "sliding scale" approach in evaluating searches of students. *M.M.*, 607 F.2d at 589 ("[Where] the intrusiveness of the search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause, even in the school context. Thus, when a teacher conducts a highly intrusive invasion such as the strip search in this case, it is reasonable to require that probable cause be present."); *see also Doe v. Renfrow*, 475 F. Supp. 1012, 1024-25 (N.D. Ind. 1979) (finding that a nude search violated a middle school student's Fourth Amendment rights where unsupported by "reasonable cause"), *aff'd*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

C. This Court's Decision in *New Jersey v. T.L.O.* Adopted the Reasonableness Standard as Appropriate in Analysis of Searches of Students Under the Fourth Amendment.

In *T.L.O.*, this Court addressed the question of whether the search of a fourteen-year-old female student's purse by a public school official violated her Fourth Amendment rights. *T.L.O.*, 469 U.S. at 327-28. Recognizing school officials as state actors, this Court rejected the theory of *in loco parentis* and found that the "[Fourth] Amendment's prohibition on unreasonable searches and seizures applie[d] to searches conducted by public school officials." *Id.* at 333, 336-37. At the same time, this Court embraced the common law standard of reasonableness in protecting

children from unreasonable searches by requiring searches of students to be reasonable at the inception of the search and then reasonable in scope. *Id.* at 341-42.

Noting the need to maintain "a certain degree of flexibility in school disciplinary procedures," this Court adopted a reasonableness standard to balance "the child's interest in privacy [against] the substantial interest of [school officials] in maintaining discipline," based on the search's context. *Id.* at 337, 339-41. A two-pronged test was articulated. *Id.* at 341-42. First, the search must be "justified at its inception," meaning that "there are reasonable grounds for suspecting that the search will turn up evidence" of the student's school rule violation. *Id.* Second, the conducted search must be "reasonably related in scope to the circumstances which [initially] justified the [search]," meaning "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). In *T.L.O.*, the student's purse was searched by the assistant principal after a teacher reported T.L.O. smoking cigarettes in the school bathroom. *Id.* at 345. This Court concluded the search in question was "justified at its inception" because the school official had a reasonable suspicion he would find contraband. *Id.* at 345-46. And the scope of the search was reasonable in light of the initial report. *Id.*

D. Circuit Courts Apply a Flexible Reasonableness Standard for Strip Searches.

Over the past three decades, this Court has provided latitude to courts in determining the reasonableness of searches and seizures. *See Illinois v. Gates*, 462 U.S. 213, 252 (1983) (shifting from the rigid analysis under *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) to "totality of the circumstances"). Although *T.L.O.* did not involve a strip search, seven circuit courts of appeal have interpreted it to apply a reasonableness standard to measure the constitutionality of strip searches of students. *See, e.g., Redding v. Safford Unified Sch. Dist.*, 531 F.3d 1071, 1080 (9th Cir. 2008) (*en banc*); *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006); *Hedges v. Musco*, 204 F.3d 109, 116-17 (3d Cir. 2000); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 824 (11th Cir. 1997); *Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1320-21 (7th Cir. 1993); *Williams v. Ellington*, 936 F.2d 881, 884 (6th Cir. 1991). Various courts have found *T.L.O.* to require school officials to provide a quantum of information as reliable indicia to justify strip searches at their inception. *Cornfield*, 991 F.2d at 1320-21.

For example, the Sixth Circuit found the strip search of two students reasonable only after the school's principal accumulated incriminating information one week before conducting the searches. *Williams*, 936 F.2d at 887. The principal received tips that one of the students possessed a glass vial with white powder

in it; learned that the students "place[d] white powder on their fingers and sniff[ed] it;" compiled teacher observations about those students; and had conversations with the suspected students' parents and guardians, one of whom disclosed that money was missing from his bureau. *Id.* at 882-83. Before conducting the strip search, the principal confronted the suspected students and one of them produced a brown vial. *Id.* at 883. Unable to recover the vial mentioned by the informant, the principal conducted a search of the girls' lockers, books, and other belongings. *Id.* The strip searches were conducted only after an exhaustive search did not yield the vial. *Id.*

Similarly, the evidence compiled by the school officials in *Cornfield* justified the strip search of a sixteen-year-old student where three school employees observed a suspicious bulge in his crotch area. *Cornfield*, 991 F.2d at 1322. This, along with corroborating observations made by school employees and the student's claim that he had "crotched" drugs in the past, amounted to "reasonable suspicion" justifying a strip search. *Id.* at 1322-23.

More recently, the Second Circuit found that a "tip from a fellow student, [the suspected student's] past disciplinary problems . . . the suspicious manner of [the suspected student's] denial, and . . . the discovery of cigarettes in [the suspected student's] purse" were insufficient to establish "reasonable suspicion" to justify a strip search. *Phaneuf*, 448 F.3d at 596. The court held "that as the intrusiveness of the

search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause, even in the school context." *Id.* at 596 (citing *M.M.*, 607 F.2d at 589). In particular, the Second Circuit challenged the reliability of the informant's tip as justifying the search because the principal receiving that tip did not investigate, corroborate, or substantiate it. *Id.* at 598.

Courts have also used a sliding scale to determine whether the strip search of a student by a school official was based on "reasonable suspicion," depending on the object sought. *T.L.O.*, 496 U.S. at 337-38; *Phaneuf*, 448 F.3d at 596. The Seventh Circuit endorsed the use of this distinction when it concluded that "[w]hat may constitute reasonable suspicion for a search of a locker or even a pocket . . . may fall well short of reasonableness for a nude search." *Cornfield,* 991 F.2d at 1321. These courts acknowledge that a robust inquiry with respect to the reasonableness of a strip search is appropriate in recognition of the intrusive nature of such a search, often requiring exigent circumstances to justify it. In fact, seven states have banned strip searches by public school officials explicitly. Cal. Educ. Code § 49050 (West 2006); Iowa Code § 808A.2(4)(a) (2003); N.J. Stat. Ann. § 18A:37-6.1 (West 1999); Okla. Stat. tit. 70, § 24-102 (2005); S.C. Code Ann. § 59-63-1140 (2008); Wash. Rev. Code § 28A.600.230 (2009); Wis. Stat. § 118.32 (2004).

The trend among the courts is to permit schools to engage in strip searches only where there is reasonable suspicion that a student possesses narcotics or weapons, and the school officials have marshaled corroborating and reliable information to confirm these suspicions. As the aforementioned sections make clear, the cases leading up to and following *T.L.O.* adopt the basic common law traditions that informed the analysis of the treatment of students by teachers under the *in loco parentis* doctrine applied to tort law: that the search must be reasonable when viewed in light of the totality of the circumstances.

III. COMMON LAW PRINCIPLES, INFORMED BY MORE RECENT FOURTH AMENDMENT JURISPRUDENCE, COUNSEL THIS COURT TO FIND THAT THE SEARCH OF MS. REDDING WAS UNREASONABLE UNDER THE CIRCUMSTANCES, AND THUS, UNCONSTITUTIONAL.

In the eyes of the common law, through either the *Pendergrass* or *Lander* lines of decisional law, the search of Ms. Redding was unreasonable. When viewed through the prism of more recent jurisprudence under the Fourth Amendment, this search was also wanting.

Courts, under either the common law or more recent Fourth Amendment jurisprudence, assess the reasonableness of the treatment endured by Ms. Redding by school administrators in light of the totality of the circumstances. Here, Ms. Redding was

accused of having prescription drugs on her person by a student under suspicion for that very violation of school rules. Yet Ms. Redding had no disciplinary record and gave the school no other reason to suspect her of the alleged infraction. Despite the lack of any other evidence against her, the school proceeded to insist that she disrobe and expose her breasts and genitalia as a means of absolving herself of the accusations against her. Two hundred years of common law tradition and fifty years of Fourth Amendment jurisprudence do not countenance such conduct when it is disproportionate to the alleged offense, could cause serious and lasting injury, and is not justified by exigent circumstances.

It is respectfully submitted that under the common law, under cases articulating Fourth Amendment jurisprudence leading up to *New Jersey v. T.L.O.*, under this Court's ruling in *T.L.O.*, and under the decisions of circuit courts of appeals construing the reasonableness of strip searches of students under the *T.L.O.* standard, the search of Ms. Redding was unreasonable. And if it was unreasonable, it was unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals sitting *en banc* should be affirmed.

Respectfully submitted,

RAYMOND H. BRESCIA
ALBANY LAW SCHOOL
80 New Scotland Ave.
Albany, NY 12208
(518) 445-3247
Counsel of Record
Counsel for Amici Curiae

April 1, 2009